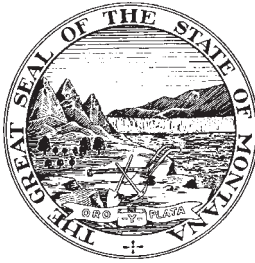


# **WAGE HOUR LAWS of the STATE OF MONTANA**



DEPARTMENT OF LABOR & INDUSTRY  
EMPLOYMENT RELATIONS DIVISION  
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**2007**

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## CONTENTS

Page No.		Beginning Statute
<b>A</b>		
32	Alcohol/Drug testing .....	39-2-205
38	Aliens, Employment of .....	39-2-305
1	Annual leave for public employees .....	2-18-601
53	Attorney fees and court costs .....	39-3-214
<b>B</b>		
38	Bartenders, Employment of persons under 18.....	39-2-306
43	Blacklisting and protection of discharged employees.....	39-2-801
<b>C</b>		
83	Child labor laws .....	41-2-102
47	Closure of or layoff at governmental facility .....	39-2-1002
49	Compensation of employee leaving for cause.....	39-3-102
52	Commissioner, investigative powers .....	39-3-210
53	Commissioner to take wage assignments.....	39-3-211
30	Cooperation with federal government.....	39-1-104
31	Confidential employment.....	39-2-103
71	Contractor Registration .....	39-9-101
	<i>(Any questions pertaining to this section should be directed to the Contractor Registration Unit at 444-7734)</i>	
52	Contracts in violation of part void.....	39-3-208
54	County attorney, authority.....	39-3-215
53	Court costs and attorney fees .....	39-3-214
53	Court enforcement of Commissioner's determination .....	39-3-212
<b>D</b>		
37	Deception as to character of employment.....	39-2-303
49	Deductions from wages, Employer to furnish itemized statement .....	39-3-101
10	Deputies and assistants, compensation .....	7-4-2504
37	Discharge or layoff because of garnishment.....	39-2-302
53	Disposition of wages .....	39-3-213
32	Drug/Alcohol testing .....	39-2-205
30	Duties of Department.....	39-1-102
<b>E</b>		
43	Employee to be furnished with reason for discharge.....	39-2-801
38	Employment of persons under 18 as bartenders.....	39-2-306
38	Employment of aliens.....	39-2-305
31	Employment defined .....	39-2-101

## CONTENTS

53	Enforcement of Commissioner's Order .....	39-3-212
49	Equal pay for women for equivalent service .....	39-3-104
58	Exclusion from overtime .....	39-3-406(2)
57	Exclusion from minimum wage and overtime .....	39-3-406(1)

## F

56	Farm labor, minimum wage .....	39-3-404
57	Farm labor, overtime exemption .....	39-3-405

## G

37	Garnishment .....	39-2-302
42	General liability arising from employment relationship .....	39-2-701
31	General obligations of employers .....	39-2-201
39	General obligation of employees .....	39-2-401

## H

66	Hours of labor in certain employments .....	39-4-101
12	Hours of work, deputy sheriffs 1st and 2nd class county .....	7-32-2111
2	Holiday observance when falling on an employee's day off .....	2-18-603

## I

79	Independent Contractor (Workers' Compensation definition .....	39-71-417
	<i>(Any questions pertaining to this section should be directed to the Independent Contractor Central Unit at 444-7734)</i>	
52	Investigative powers of Commissioner .....	39-3-210

## J

7	Jury Duty, public employees .....	2-18-619
---	-----------------------------------	----------

## L

7	Leave to hold public office .....	2-18-620
43	Liability of mining company .....	39-2-704
42	Liability of railroads .....	39-2-703
38	Lie detector tests .....	39-2-304
21	Little Davis-Bacon law .....	18-2-401

## M

41	Master and servant .....	39-2-601
37	Medical exams as a condition of employment .....	39-2-301
13	Military Service Employment Rights .....	10-1-1001
4	Military leave .....	2-18-614
12	Minimum wage for police departments .....	7-32-4116
56	Minimum wage law .....	39-3-404

## CONTENTS

61	Mineral and oil industry .....	39-3-501
83	Minors, employment of .....	41-2-102
13	Montana Military Service Employment Rights .....	10-1-1001

### O

57	Overtime provisions .....	39-3-405
12	Overtime for police departments .....	7-32-4118

### P

50	Pay days .....	39-3-203
50	Payment of wages generally .....	39-3-204
51	Payment of wages when employee is separated from employment prior to pay day .....	39-3-205
52	Penalty for failure to pay wages .....	39-3-206
12	Police, wages and hours .....	7-32-2111
30	Powers of department .....	39-1-103
21	Prevailing wage law .....	18-2-401

### R

11	Rate of pay for deputy sheriff .....	7-4-2508
54	Reciprocal agreement for wage collection .....	39-3-301
77	Right to work without union interference in certain small businesses .....	39-33-101

### S

10	Salaries, county officials .....	7-4-2504
31	Seats for employees .....	39-2-201
6	Sick leave, public employees .....	2-18-618
49	Statement of deductions .....	39-3-101
77	Strike breakers .....	39-33-201

### T

41	Termination of employment .....	39-2-502
----	---------------------------------	----------

### U

11	Undersheriff and deputy sheriff, compensation .....	7-4-2508
----	---	----------

### V

3	Vacation, annual leave public employees .....	2-18-611
---	---	----------

### W

53	Wage assignments .....	39-3-211
61	Wage protection for certain employees of mineral and oil industry .....	39-3-501

## CONTENTS

31	What belongs to employer.....	39-2-102
32	Workforce Drug/Alcohol Testing Act .....	39-2-205
79	Workers' Compensation Independent Contractor definition .....	39-71-417
	<i>(Any questions pertaining to this section should be directed to the Independent Contractor Central Unit at 444-7734)</i>	
44	Wrongful Discharge Act .....	39-2-901

## TITLE 2

### GOVERNMENT STRUCTURE AND ADMINISTRATION

#### CHAPTER 18

#### STATE EMPLOYEE CLASSIFICATION, COMPENSATION, AND BENEFITS

##### Part 6 – Leave Time

**2-18-601. Definitions.** For the purpose of this part, except 2-18-620, the following definitions apply:

(1) (a) “Agency” means any legally constituted department, board, or commission of state, county, or city government or any political subdivision of the state.

(b) The term does not mean the state compensation insurance fund.

(2) “Break in service” means a period of time in excess of 5 working days when the person is not employed and that severs continuous employment.

(3) “Common association” means an association of employees established pursuant to 2-18-1310 for the purposes of employer and employee participation in the plan.

(4) “Continuous employment” means working within the same jurisdiction without a break in service of more than 5 working days or without a continuous absence without pay of more than 15 working days.

(5) “Contracting employer” means an employer who, pursuant to 2-18-1310, has contracted with the department of administration to participate in the plan.

(6) “Employee” means any person employed by an agency except elected state, county, and city officials, schoolteachers, persons contracted as independent contractors or hired under personal services contracts, and student interns.

(7) “Full-time employee” means an employee who normally works 40 hours a week.

(8) “Holiday” means a scheduled day off with pay to observe a legal holiday, as specified in 1-1-216 or 20-1-305, except Sundays.

(9) “Member” means an employee who belongs to a voluntary employees’ beneficiary association established under 2-18-1310.

(10) “Part-time employee” means an employee who normally works less than 40 hours a week.

(11) “Permanent employee” means a permanent employee as defined in 2-18-101.

(12) “Plan” means the employee welfare benefit plan established under Internal Revenue Code section 501(c)(9) pursuant to 2-18-1304.

(13) “Seasonal employee” means a seasonal employee as defined in 2-18-101.

(14) “Short-term worker” means:

## GOVERNMENT STRUCTURE AND ADMINISTRATION

(a) for the executive and judicial branches, a short-term worker as defined in 2-18-101; or

(b) for the legislative branch, an individual who:

(i) is hired by a legislative agency for an hourly wage established by the agency;

(ii) may not work for the agency for more than 6 months in a continuous 12-month period;

(iii) is not eligible for permanent status;

(iv) may not be hired into another position by the agency without a competitive selection process; and

(v) is not eligible to earn the leave and holiday benefits provided in this part or the group insurance benefits provided in part 7.

(15) "Sick leave" means a leave of absence with pay for:

(a) a sickness suffered by an employee or a member of the employee's immediate family; or

(b) the time that an employee is unable to perform job duties because of:

(i) a physical or mental illness, injury, or disability;

(ii) maternity or pregnancy-related disability or treatment, including prenatal care, birth, or medical care for the employee or the employee's child;

(iii) parental leave for a permanent employee as provided in 2-18-606;

(iv) quarantine resulting from exposure to a contagious disease;

(v) examination or treatment by a licensed health care provider;

(vi) short-term attendance, in an agency's discretion, to care for a relative or household member not covered by subsection (15)(a) until other care can reasonably be obtained;

(vii) necessary care for a spouse, child, or parent with a serious health condition, as defined in the Family and Medical Leave Act of 1993; or

(viii) death or funeral attendance of an immediate family member or, at an agency's discretion, another person.

(16) "Student intern" means a student intern as defined in 2-18-101.

(17) "Temporary employee" means a temporary employee as defined in 2-18-101.

(18) "Transfer" means a change of employment from one agency to another agency in the same jurisdiction without a break in service.

(19) "Vacation leave" means a leave of absence with pay for the purpose of rest, relaxation, or personal business at the request of the employee and with the concurrence of the employer.

**2-18-603. Holidays -- observance when falling on employee's day off.** (1) (a) A full-time employee who is scheduled for a day off on a day that is observed as a legal holiday, except Sundays, is entitled to receive a day off with pay either on the day preceding the holiday or on another day following the holiday in the same pay period or as scheduled by the employee and the employee's supervisor, whichever allows a day off in addition to the employee's regularly scheduled days off, provided the employee is in a pay status on the employee's

last regularly scheduled working day immediately before the holiday or on the employee's first regularly scheduled working day immediately after the holiday.

(b) Part-time employees receive pay for the holiday on a prorated basis according to rules adopted by the department of administration or appropriate administrative officer under 2-18-604.

(c) A short-term worker may not receive holiday pay.

(2) For purposes of this section, the term "employee" does not include nonteaching school district employees.

**2-18-604. Administration of rules.** The department of administration or the administrative officer of any county, city, or political subdivision is responsible for the proper administration of the employee annual, sick, or military leave provisions and the jury duty provisions found in this part and may, when necessary, promulgate rules necessary to achieve the uniform administration of these provisions and to prevent the abuse of these provisions. When promulgated, the rules are effective as to all employees of the state or any county, city, or political subdivision of the state.

**2-18-606. Parental leave for state employees.** (1) The department of administration shall develop a parental leave policy for permanent state employees. The policy must permit an employee to take a reasonable leave of absence and permit the employee to use sick leave immediately following the birth or placement of a child for a period not to exceed 15 working days if:

(a) the employee is adopting a child; or

(b) the employee is a birth father.

(2) As used in this section, "placement" means placement for adoption as defined in 33-22-130.

(3) A state agency that is not subject to the provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 through 2654, may extend the provisions of that act to the employees of the agency.

**2-18-607 through 2-18-610 reserved.**

**2-18-611. Annual vacation leave.** (1) Each permanent full-time employee shall earn annual vacation leave credits from the first day of employment. Vacation leave credits earned must be credited at the end of each pay period. However, employees are not entitled to any vacation leave with pay until they have been continuously employed for a period of 6 calendar months.

(2) Seasonal employees earn vacation credits. However, seasonal employees must be employed for 6 qualifying months before they may use the vacation credits. In order to qualify, seasonal employees shall immediately report back for work when operations resume in order to avoid a break in service.

(3) Permanent part-time employees are entitled to prorated annual vacation benefits if they have worked the qualifying period.



## GOVERNMENT STRUCTURE AND ADMINISTRATION

(4) An employee may not accrue annual vacation leave credits while in a leave-without-pay status.

(5) Temporary employees earn vacation leave credits but may not use the credits until after working for 6 qualifying months.

(6) A short-term worker or a student intern, as both terms are defined in 2-18-601, may not earn vacation leave credits, and time worked as a short-term worker or as a student intern does not apply toward the person's rate of earning vacation leave credits.

**2-18-612. Rate earned.** (1) Vacation leave credits are earned at a yearly rate calculated in accordance with the following schedule, which applies to the total years of an employee's employment with any agency whether the employment is continuous or not:

Years of employment	Working days credit
1 day through 10 years	15
10 years through 15 years	18
15 years through 20 years	21
20 years or more	24

(2) (a) For the purpose of determining years of employment under this section, an employee eligible to earn vacation credits under 2-18-611 must be credited with 1 year of employment for each period of:

(i) 2,080 hours of service following the date of employment. An employee must be credited with 80 hours of service for each biweekly pay period in which the employee is in a pay status or on an authorized leave of absence without pay, regardless of the number of hours of service in the pay period.

(ii) 12 calendar months in which the employee was in a pay status or on an authorized leave of absence without pay, regardless of the number of hours of service in any 1 month. An employee of a school district, a school at a state institution, or the university system must be credited with 1 year of service if the employee is employed for an entire academic year.

(b) State agencies, other than the university system and a school at a state institution, shall use the method provided in subsection (2)(a)(i) to calculate years of service under this section.

**2-18-614. Military leave considered service.** A period of absence from employment with the state, county, or city occurring either during a war involving the United States or in any other national emergency and for 90 days thereafter for one of the following reasons is considered as service for the purpose of determining the number of years of employment used in calculating vacation leave credits under this section:

(1) having been ordered on active duty with the armed forces of the United States;

(2) voluntary service on active duty in the armed forces or on ships operated by or for the United States government; or

(3) direct assignment to the United States department of defense for duties

related to national defense efforts if a leave of absence has been granted by the employer.

**2-18-615. Absence because of illness not chargeable against vacation unless employee approves.** Absence from employment by reason of illness shall not be chargeable against unused vacation leave credits unless approved by the employee.

**2-18-616. Determination of vacation dates.** The dates when employees' annual vacation leaves are granted must be determined by agreement between each employee and the employing agency with regard to the best interest of the state or any county or city of the state as well as the best interests of each employee.

**2-18-617. Accumulation of leave -- cash for unused -- transfer.**

**(1) (a)** Except as provided in subsection (1)(b), annual vacation leave may be accumulated to a total not to exceed two times the maximum number of days earned annually as of the end of the first pay period of the next calendar year. Excess vacation time is not forfeited if taken within 90 calendar days from the last day of the calendar year in which the excess was accrued.

**(b)** It is the responsibility of the head of an employing agency to provide reasonable opportunity for an employee to use rather than forfeit accumulated vacation leave. If an employee makes a reasonable written request to use excess vacation leave before the excess vacation leave must be forfeited under subsection (1)(a) and the employing agency denies the request, the excess vacation leave is not forfeited and the employing agency shall ensure that the employee may use the excess vacation leave before the end of the calendar year in which the leave would have been forfeited under subsection (1)(a).

**(2) (a)** An employee who terminates employment for a reason not reflecting discredit on the employee and who has worked the qualifying period set forth in 2-18-611 is entitled upon the date of termination to either:

**(i)** cash compensation for unused vacation leave if the employee is not subject to subsection (2)(a)(ii); or

**(ii)** conversion of the employee's unused vacation leave balance to an employer contribution to an employee welfare benefit plan health care expense trust account established pursuant to 2-18-1304 if:

**(A)** the employee is a member who belongs to a voluntary employees' beneficiary association established under 2-18-1310; and

**(B)** the contracting employer has entered into an agreement with members of the common association for an employer contribution based on unused vacation leave provided for in 2-18-611.

**(b)** Vacation leave contributed to the sick leave fund, provided for in 2-18-618, is nonrefundable and is not eligible for cash compensation upon termination.

**(3)** If an employee transfers between agencies of the same jurisdiction, cash compensation may not be paid for unused vacation leave. In a transfer, the

## GOVERNMENT STRUCTURE AND ADMINISTRATION

receiving agency assumes the liability for the accrued vacation credits transferred with the employee.

(4) An employee may contribute accumulated vacation leave to a nonrefundable sick leave fund provided for in 2-18-618. The department of administration shall, in consultation with the state employee group benefits advisory council, provided for in 2-15-1016, adopt rules to implement this subsection.

(5) This section does not prohibit a school district from providing cash compensation for unused vacation leave in lieu of the accumulation of the leave, either through a collective bargaining agreement or, in the absence of a collective bargaining agreement, through a policy.

**2-18-618. Sick leave.** (1) A permanent full-time employee earns sick leave credits from the first day of employment. For calculating sick leave credits, 2,080 hours (52 weeks x 40 hours) equals 1 year. Sick leave credits must be credited at the end of each pay period. Sick leave credits are earned at the rate of 12 working days for each year of service without restriction as to the number of working days that may be accumulated. Employees are not entitled to be paid sick leave until they have been continuously employed 90 days.

(2) An employee may not accrue sick leave credits while in a leave-without-pay status.

(3) Permanent part-time employees are entitled to prorated leave benefits if they have worked the qualifying period.

(4) Full-time temporary and seasonal employees are entitled to sick leave benefits provided they work the qualifying period.

(5) A short-term worker may not earn sick leave credits.

(6) Except as otherwise provided in 2-18-1311, an employee who terminates employment with the agency is entitled to a lump-sum payment equal to one-fourth of the pay attributed to the accumulated sick leave. The pay attributed to the accumulated sick leave must be computed on the basis of the employee's salary or wage at the time the employee terminates employment with the state, county, or city. Accrual of sick leave credits for calculating the lump-sum payment provided for in this subsection begins July 1, 1971. The payment is the responsibility of the agency in which the sick leave accrues. However, an employee does not forfeit any sick leave rights or benefits accrued prior to July 1, 1971. However, when an employee transfers between agencies within the same jurisdiction, the employee is not entitled to a lump-sum payment. In a transfer between agencies, the receiving agency shall assume the liability for the accrued sick leave credits earned after July 1, 1971, and transferred with the employee.

(7) An employee who receives a lump-sum payment pursuant to this section or who, pursuant to 2-18-1311, converts unused sick leave to employer contributions to a health care expense trust account and who is again employed by any agency may not be credited with sick leave for which the employee has previously been compensated or for which the employee has received an employer contribution to the health care expense trust account.

(8) Abuse of sick leave is cause for dismissal and forfeiture of the lump-sum payments provided for in this section.

(9) An employee of a state agency may contribute any portion of the employee's accumulated sick leave or accumulated vacation leave to a nonrefundable sick leave fund for state employees and becomes eligible to draw upon the fund if an extensive illness or accident exhausts the employee's accumulated sick leave, irrespective of the employee's membership or nonmembership in the employee welfare benefit plan established pursuant to 2-18-1304. The department of administration shall, in consultation with the state employee group benefits advisory council, provided for in 2-15-1016, administer the sick leave fund and adopt rules to implement this subsection.

(10) A local government may establish and administer through local rule a sick leave fund into which its employees may contribute a portion of their accumulated sick leave or vacation leave.

**2-18-619. Jury duty -- service as witness.** (1) Each employee who is under proper summons as a juror shall collect all fees and allowances payable as a result of the service and forward the fees to the appropriate accounting office. Juror fees must be applied against the amount due the employee from the employer. However, if an employee elects to use annual leave to serve on a jury, the employee may not be required to remit the juror fees to the employer. An employee is not required to remit to the employer any expense or mileage allowance paid by the court.

(2) An employee subpoenaed to serve as a witness shall collect all fees and allowances payable as a result of the service and forward the fees to the appropriate accounting office. Witness fees must be applied against the amount due the employee from the employer. However, if an employee elects to use annual leave to serve as a witness, the employee may not be required to remit the witness fees to the employer. An employee is not required to remit to the employer any expense or mileage allowances paid by the court.

(3) Employers may request the court to excuse their employees from jury duty if they are needed for the proper operation of a unit of state or local government.

**2-18-620. Mandatory leave of absence for employees holding public office -- return requirements.** (1) Employers of employees elected or appointed to a public office in the city, county, or state shall grant such employees leaves of absence, not to exceed 180 days per year, while they are performing public service. Employees of an employer who employs 10 or more persons must, upon complying with the requirements of subsection (2), be restored to their positions, with the same seniority, status, compensation, hours, locality, and benefits as existed immediately prior to their leaves of absence for public service under this section.

(2) Employees granted a leave shall make arrangements to return to work within 10 days following the completion of the service for which the leave was granted unless they are unable to do so because of illness or disabling injury

## GOVERNMENT STRUCTURE AND ADMINISTRATION

certified to by a licensed physician.

**(3)** Any unemployment benefits paid to any person by application of this section shall not be charged against any employer under the unemployment insurance law.

**2-18-621. Unlawful termination -- unlawful payments. (1)** It is unlawful for an employer to terminate or separate an employee from employment in an attempt to circumvent the provisions of 2-18-611, 2-18-612, and 2-18-614. If a question arises under this subsection, it must be submitted to arbitration as provided in Title 27, chapter 5, as if an agreement described in 27-5-114 is in effect, unless there is an applicable collective bargaining agreement to the contrary.

**(2) (a)** An employee who terminates employment is entitled to receive only:

**(i)** payments for accumulated wages, vacation leave as provided in 2-18-617, sick leave as provided in 2-18-618, and compensatory time earned as provided in the rules or policies of the employer; and

**(ii)** if the termination is the result of a reduction in force, severance pay and a retraining allowance as provided for in 2-18-622.

**(b)** An employee who terminates employment may not receive severance pay, a bonus, or any other type of monetary payment not described in subsection (2)(a)(i) or (2)(a)(ii).

**(3)** Subsection (2) does not apply to:

**(a)** retirement benefits;

**(b)** a payment, settlement, award, or judgment that involves a potential or actual cause of action, legal dispute, claim, grievance, contested case, or lawsuit; or

**(c)** any other payment authorized by law.

**2-18-622. Reduction in force -- severance pay and retraining allowance required.** If a reduction in force is necessary, the state may provide severance pay and a retraining allowance. Within a collective bargaining unit, severance pay and the retraining allowance are negotiable subjects under 39-31-305.

**2-18-623 through 2-18-625 reserved.**

**2-18-626. Department of justice employees -- payment of compensation for time spent answering subpoena.** A department of justice employee must receive all regular duty pay and benefits for time spent answering a subpoena in a civil or criminal cause when called to testify in connection with the employee's official duties. The department of justice may bill the person or organization requesting issuance of the subpoena for reimbursement for the employee's time.

**2-18-627. Paid leave for disaster relief volunteer service. (1)** An agency may grant to a state employee up to 15 days in a calendar year of a paid leave of absence for the employee to participate in specialized disaster relief services for the American red cross if:

(a) the employee is a certified American red cross disaster relief volunteer; and

(b) the American red cross has requested the employee's services.

**(2)** Leave time granted pursuant to this section:

(a) must be paid at the regular rate of compensation, including regular group, retirement, or leave accrual benefits, for the regular work hours during which the employee is absent from the employee's regular duties;

(b) commences upon approval of the employee's employing agency; and

(c) may not be charged against any other leave to which the employee is entitled.

**(3)** For purposes of this section, the following definitions apply:

(a) "Agency" has the meaning provided in 2-18-101.

(b) "Employee" means any person employed by an agency, except an elected official.

**2-18-628 through 2-18-640 reserved.**

**2-18-641. Exemption -- employees of certain county hospitals or rest homes and hospital districts. (1)** An employee of a county hospital or county rest home in a third, fourth, fifth, sixth, or seventh class county or an employee of a hospital district is exempt from the provisions of this part.

**(2)** For any reduction in leave benefits for an employee subject to subsection (1), there must be an increase in compensation or benefits.

**TITLE 7**

**LOCAL GOVERNMENT**

**CHAPTER 4**

**OFFICERS AND EMPLOYEES**

**Part 25 – Compensation and Official Fees**

**7-4-2504. Salaries to be fixed by resolution -- cost-of-living increments.** The county governing body shall by resolution on or before August 1 of each year adjust and uniformly fix the salaries of the county treasurer, county clerk, county assessor, county school superintendent, county sheriff, clerk of district court, county auditor (if there is one), justice of the peace, and county surveyor (if the surveyor receives a salary) by adding to the annual salary provided for in 7-4-2503(1) a cost-of-living increment based upon the schedule developed and approved by the county compensation board provided for in 7-4-2503(4).

**7-4-2505. Amount of compensation for deputies and assistants.**  
**(1)** Subject to subsection (2), the boards of county commissioners in the several counties in the state shall fix the compensation allowed any deputy or assistant of the following officers:

- (a)** clerk and recorder;
- (b)** clerk of the district court;
- (c)** treasurer;
- (d)** county attorney;
- (e)** auditor.

**(2) (a)** The salary of a deputy or an assistant listed in subsection (1), other than a deputy county attorney, may not be more than 90% of the salary of the officer under whom the deputy or assistant is serving. The salary of a deputy county attorney, including longevity payments provided in 7-4-2503(3)(d), may not exceed the salary of the county attorney under whom the deputy is serving.

**(b)** If a deputy or assistant is employed for a period of less than 1 year, the compensation of the deputy or assistant must be for the time employed, provided the rate of compensation may not be in excess of the rates provided by law for similar deputies and assistants.

**7-4-2507. Deputy sheriff and undersheriff provisions -- construction.** If there is a conflict between 7-4-2508 through 7-4-2510 and any other law, 7-4-2508 through 7-4-2510 govern with respect to undersheriffs and deputy sheriffs.

**7-4-2508. Compensation of undersheriff and deputy sheriff. (1)** The sheriff shall fix the compensation of the undersheriff at 95% of the salary of that sheriff.

**(2) (a)** The sheriff shall fix the compensation of the deputy sheriff based upon a percentage of the salary of that sheriff according to the following schedule: In counties with population of:

Below 15,000	85% to 90%
15,000 to 29,999	76% to 90%
30,000 to 74,999	74% to 90%
75,000 and over	72% to 90%

**(b)** The sheriff shall adjust the compensation of the deputy sheriff within the range prescribed in subsection (2)(a) according to a rank structure in the office.

**(3)** For purposes of this section, the term "compensation" means the base rate of pay and does not mean longevity payments or payments for hours worked overtime.

**7-4-2509. Sheriff's office -- work period in lieu of workweek -- overtime compensation. (1) (a)** A sheriff's office may establish a work period other than the workweek provided in 39-3-405 or 7-32-2111 for determining when an employee may be paid overtime.

**(b)** The aggregate of all work periods in a year, when expressed in hours, may not exceed 2,080 hours.

**(2)** The board of county commissioners may by resolution establish that any undersheriff or deputy sheriff who works in excess of the regularly scheduled work period will be compensated for the hours worked in excess of the work period at a rate to be determined by that board of county commissioners.

**7-4-2510. Sheriff's office -- longevity payments.** Beginning on the date of the deputy sheriff's or undersheriff's first anniversary of employment with the office and adjusted annually, a deputy sheriff or undersheriff is entitled to receive a longevity payment amounting to 1% of the minimum base annual salary for each year of service with the office, but years of service during any year in which the salary was set at the same level as the salary of the prior fiscal year may not be included in any calculation of longevity increases. This payment must be made in equal monthly installments.



## CHAPTER 32

## LAW ENFORCEMENT

**7-32-2111. Hours of work for deputy sheriff of county of first or second class.** Any person employed as a deputy sheriff of a first- or second-class county shall not be forced to work in excess of 40 hours per week except in case of an emergency and shall be entitled to 2 days off in each 7-day period.

**7-32-4116. Minimum wage of police in first- and second-class cities.**

(1) Each duly confirmed member of a police department of cities of the first and second class of Montana is entitled to a minimum wage for a daily service of 8 hours' work of at least \$750 per month for the first year of service and thereafter at least \$750 a month plus 1% of the minimum base monthly salary of \$750 for each additional year of service up to and including the 20th year of additional service.

(2) This section applies to cities and towns not of the first class which have elected to come under the provisions of Chapter 120, Laws of 1929, as amended, or Chapter 335, Laws of 1974, as amended.

(3) Added salary for years of service will be based on the base monthly salary as established in this section and not on the actual current salary.

**7-32-4118. Work period -- days off duty without loss of compensation.** (1) The chief of police may establish the work period for officers and other personnel in the department and may establish a work period other than that provided in 39-3-405 for determining when an employee must be paid overtime compensation. The total hours in all work periods in a calendar year may not exceed 2,080.

(2) Each officer or other employee of the police force in every city of the first and second class shall, in each calendar year, be given a minimum of 104 days off duty without loss of compensation, not including holidays, sick leave, vacation leave, or other types of compensated time off duty.

**7-32-4119. Overtime compensation.** Members of police departments of cities of the first and second class, except those officers holding the rank of captain or above, are entitled to overtime compensation for hours worked in excess of the work period established by the chief of police under 7-32-4118.

**7-32-4121. Action to recover salary.** (1) Actions to recover salaries by members of the police departments of cities must be commenced within 6 months after the cause of action shall have accrued.

(2) No action for unpaid salary can be maintained by members of the police department of cities except for service actually rendered and, if suspended or placed on the eligible list, then only for the days the member of the police department reports for duty.

(3) The word "action", as used in this section, is to be construed, whenever it is necessary to do so, as including a special proceeding of a civil nature.

## TITLE 10

### MILITARY AFFAIRS AND DISASTER AND EMERGENCY SERVICES

#### CHAPTER 1

#### MILITIA

#### Part 10 – Montana Military Service Employment Rights

**10-1-1001. Short title.** This part may be cited as the “Montana Military Service Employment Rights Act”.

**10-1-1002. Purpose -- legislative intent.** The purpose of this part is to recognize the importance of the service performed by Montana national guard members and to protect the employment rights of national guard members who may be called to state active duty when there is a state emergency or disaster. The legislature also supports the efforts and sacrifices of the employers of Montana national guard members and intends that this part will provide a means for national guard members and employers to work cooperatively to resolve any workplace issues.

**10-1-1003. Definitions.** Unless the context requires otherwise, as used in this part, the following definitions apply:

**(1)** “Department” means the department of labor and industry established in 2-15-1701.

**(2)** “Elected official” means an official duly elected or appointed to any state or local judicial, legislative, or executive elective office of the state, a district, or a political subdivision of the state, including a school district or any other local district.

**(3) (a)** “Employer” means any public or private person or entity providing employment in Montana.

**(b)** The term does not include the United States.

**(4)** “Federally funded military duty” means duty, including training, performed pursuant to orders issued under Title 10 or 32 of the United States Code and the time period, if any, required pursuant to a licensed physician's certification to recover from an illness or injury incurred while performing the duty.

**(5)** “Member” means a member of the state's organized militia provided for in 10-1-103.

**(6)** “Military service” includes both federally funded military duty and state active duty.

**(7) (a)** “State active duty” means duty performed by a member when a disaster or an emergency has been declared by the proper authority of the state

## MILITARY AFFAIRS AND DISASTER AND EMERGENCY SERVICES

pursuant to Article VI, section 13, of the Montana constitution to include the time period, if any, required pursuant to a licensed physician's certification to recover from an illness or injury incurred while performing the active duty.

**(b)** The term does not include federally funded military duty.

**10-1-1004. Rights under federal law.** A person ordered to federally funded military duty is entitled to all of the employment and reemployment rights and benefits provided pursuant to the federal Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301, et seq., and other applicable federal law.

**10-1-1005. Prohibition against employment discrimination.** An employer may not deny employment, reemployment, reinstatement, retention, promotion, or any benefit of employment or obstruct, injure, discriminate against, or threaten negative consequences against a person with regard to employment because of the person's membership, application for membership, or potential application for membership in the state organized militia or because the person may exercise or has exercised a right or may claim or has claimed a benefit under this part.

**10-1-1006. Entitlement to leave of absence. (1)** A member ordered to state active duty is entitled to a leave of absence from the person's employment during the period of that state active duty.

**(2)** A leave of absence for state active duty may not be deducted from any sick leave, vacation leave, military leave, or other leave accrued by the member unless the member desires the deduction.

**10-1-1007. Right to return to employment without loss of benefits -- exceptions -- definition. (1)** Subject to the provisions of this section, after a leave of absence for state active duty, a member is entitled to return to employment with the same seniority, status, pay, health insurance, pension, and other benefits as the member would have accrued if the member had not been absent for the state active duty.

**(2) (a)** If a member was a probationary employee when ordered to state active duty, the employer may require the member to resume the member's probationary period from the date when the member's leave of absence for state active duty began.

**(b)** An employer may decide whether or not to authorize the member to accrue sick leave, vacation leave, military leave, or other leave benefits during the member's leave of absence for state active duty. However, the member may not be provided with lesser leave accrual benefits than are provided to all other employees of the employer in a similar but nonmilitary leave status.

**(c) (i)** An employer's health plan must provide that:

**(A)** a member may elect to not remain covered under the employer's health plan while the member is on state active duty but that when the member returns,

the member may resume coverage under the plan without the plan considering the employee to have incurred a break in service; and

**(B)** a member may elect to remain on the employer's health plan while the member is on state active duty without being required to pay more than the regular employee share of the premium, except as provided in subsection (2)(c)(ii).

**(ii)** If a member's state active duty qualifies the member for coverage under the state of Montana's health insurance plan as an employee of the department of military affairs, the employer's health plan may require the member to pay up to 102% of the full premium for continued coverage.

**(iii)** A health insurance plan covering an employee who is a member serving on state active duty is not required to cover any illness or injury caused or aggravated by state active duty.

**(iv)** If the member is a state employee prior to being ordered to state active duty, the member does not become qualified as an employee of the department of military affairs for the purposes of health plan coverage until the member's state active duty qualifies the member to be considered an employee of the department of military affairs pursuant to 2-18-701.

**(d)** An employer's pension plan must provide that when a member returns to employment from state active duty:

**(i)** the member's period of state active duty may constitute service with the employer or employers maintaining the plan for the purposes of determining the nonforfeitable of the member's accrued benefits and for the purposes of determining the accrual of benefits under the plan; and

**(ii)** if the member elects to receive credit and makes the contributions required to accrue the pension benefits that the member would have accrued if the member had not been absent for the state active duty, then the employer shall pay the amount of the employer contribution that would have been made for the member if the member had not been absent.

**(e)** An employer is not obligated to allow the member to return to employment after the member's absence for state active duty if:

**(i)** the member is no longer qualified to perform the duties of the position, subject to the provisions of 49-2-303 prohibiting employment discrimination because of a physical or mental disability;

**(ii)** the member's position was temporary and the temporary employment period has expired;

**(iii)** the member's request to return to employment was not done in a timely manner;

**(iv)** the employer's circumstances have changed so significantly that the member's continued employment with the employer cannot reasonably be expected; or

**(v)** the member's return to employment would cause the employer an undue hardship.

**(3) (a)** For the purposes of this section and except as provided in subsection (3)(b), "timely manner" means:

**(i)** for state active duty of up to 30 days, the member returned to

## **MILITARY AFFAIRS AND DISASTER AND EMERGENCY SERVICES**

employment the next regular work shift following safe travel time plus 8 hours;

(ii) for state active duty of 30 days to 180 days, the member returned to employment within 14 days of termination of state active duty; and

(iii) for state active duty of more than 180 days, the member returned to employment within 90 days of termination of the state active duty.

(b) If there are extenuating circumstances that preclude the member from returning to employment within the time period provided in subsection (3)(a) through no fault of the member, then for the purposes of this section "timely manner" means within the time period specified by the adjutant general provided for in 2-15-1202.

**10-1-1008. Leave of absence for elected officials -- restoration to office.** (1) If an elected official is ordered to military service, the official is entitled to a leave of absence for the duration of the military service.

(2) An elected official's leave of absence pursuant to this section does not create a vacancy in office or require the official to forfeit the office.

(3) If an acting official is appointed pursuant to 10-1-1010, the leave of absence must be without pay.

(4) An elected official ordered to military service is entitled to the employment rights and benefits that would be provided to any other employee under the official's employer if the employee were on a leave of absence subject to the provisions of this part.

(5) Upon returning from a leave of absence for military service, if an acting official was appointed pursuant to 10-1-1010, the returning elected official is entitled to be restored to office for the official's unexpired term immediately upon the official's request after being released from the military service.

**10-1-1009. Paid military leave for public employees.** (1) A state, city, town, or county employee who is a member of the organized militia of this state or who is a member of the organized or unorganized reserve corps or military forces of the United States and who has been an employee for a period of at least 6 months must be given leave of absence with pay accruing at a rate of 15 working days in a calendar year for performing military service.

(2) Military leave may not be charged against the employee's annual vacation time.

(3) Unused military leave must be carried over to the next calendar year, but may not exceed a total of 30 days in any calendar year.

**10-1-1010. Appointment of acting officials.** (1) When an elected official is ordered to military service, an acting official must be appointed as provided in this section if:

(a) the elected official is precluded pursuant to federal law from performing the official duties of the office; or

(b) the elected official requests the appointment of an acting official.

(2) If an acting official is appointed, the acting official shall take any oath of

office required to assume the office, shall exercise all the rights, powers, and duties vested in the office, and must be provided with all the employment rights and benefits associated with the position until the elected official is restored to office pursuant to 10-1-1008(5) or the elected official's term expires, whichever occurs first.

(3) (a) The governor shall appoint the acting official for any office elected by the state at large and for the office of district judge, public service commissioner, or any other elected regional or district office of the state.

(b) An acting official for a legislative district must be appointed using the procedures in 5-2-402.

(c) The board of county commissioners shall appoint the acting official for any elected office of a county.

(d) The city or town council shall appoint the acting official for any elected office of a city or town.

(4) For any elected office not covered under subsection (3), the governing body shall determine the method by which an acting official may be appointed pursuant to this section.

(5) An appointment of an acting official pursuant to this section must be made for a period not to exceed the unexpired term for the office and subject to the right of the elected official to be restored to the office upon returning from the military service, as provided in 10-1-1008(5).

#### **10-1-1011 through 10-1-1014 reserved.**

**10-1-1015. Procedure for filing complaint.** (1) A person entitled to rights or benefits under this part and who claims that an employer has failed or is about to fail to comply with the provisions of this part may file a complaint with the department as provided in this section.

(2) A complaint under this section must be:

(a) filed within 15 days after the member discovered the actions or practice alleged to constitute an employer's failure or imminent failure to comply with the provisions of this part; and

(b) submitted in writing to the department in a manner prescribed by the department.

(3) The department shall, upon request, provide technical assistance to a person wishing to file a complaint pursuant to this section.

#### **10-1-1016. Assistance, investigation, and enforcement of complaints.**

(1) The department shall provide assistance to any person with respect to the employment rights and benefits to which the person is entitled pursuant to this part. The department may request the assistance of federal or state agencies engaged in similar or related activities and utilize the assistance of volunteers.

(2) The department shall investigate each complaint submitted pursuant to 10-1-1015. The department shall initiate the investigation within 30 days of

## MILITARY AFFAIRS AND DISASTER AND EMERGENCY SERVICES

receiving the complaint. Within 60 days of receiving the complaint, the department shall make a finding about whether a violation of rights or benefits provided in this part has occurred or is about to occur and shall notify the complainant and the employer in writing of the finding.

(3) If the department's investigation finds that a violation of this part has occurred or is about to occur, the department shall attempt to resolve the matter by making a reasonable effort, including conference, conciliation, and persuasion, to provide redress to the complainant and ensure that the employer named in the complaint complies with the provisions of this part.

(4) If the department fails to resolve the matter within 90 days of receiving the complaint, the department shall notify the complainant of the complainant's right to request that the department refer the complaint to the state attorney general under the provisions of 10-1-1018.

**10-1-1017. Enforcement and investigative powers of department.** To carry out its enforcement and investigative duties under this part, the department has the power to:

(1) enter and inspect the places, question the employees, and investigate the facts, conditions, or matters that the department considers appropriate to determine whether an employer has violated or is about to violate the provisions of this part or that will aid the department in the enforcement of the provisions of this part; and

(2) administer oaths, examine witnesses, issue subpoenas, compel the attendance of witnesses, inspect papers, books, accounts, records, payrolls, documents, and testimony, and take depositions and affidavits relevant to the department's duties under this part.

**10-1-1018. Referral of complaint to state attorney general.** (1) A complaint that could not be successfully resolved pursuant to 10-1-1016 must be referred by the department to the state attorney general if the complainant requests the referral pursuant to 10-1-1016(4).

(2) (a) Except as provided in subsection (2)(b), if the state attorney general is satisfied that the complaint has merit, the state attorney general may file a lawsuit on behalf of and act as an attorney for the complainant in seeking relief for the complainant.

(b) (i) Except as provided in subsection (2)(b)(ii), if the complaint is against a state agency, as defined in 2-15-102, notwithstanding an arrangement for the provision of legal services to the agency by the department of justice, the agency shall provide or obtain counsel for the agency.

(ii) If the complaint is against the department of justice, the department of administration, notwithstanding an arrangement for the provision of legal services to the department of administration by the department of justice, shall provide or obtain counsel for the department of justice.

(3) If the state attorney general sues pursuant to this section, fees or court costs may not be assessed against the complainant.

**10-1-1019. Independent lawsuit not precluded -- exhaustion of administrative remedies.** Nothing in this part may be construed as infringing on a person's right to file an independent lawsuit to seek relief as a private party from an alleged violation of this part. However, if a person files a complaint with the department as provided in 10-1-1015, the person must have exhausted the administrative remedies available under 10-1-1016 before having standing to initiate an independent lawsuit.

**10-1-1020. Jurisdiction -- venue -- standing -- respondent -- time limit -- expedited hearing.** In any lawsuit initiated pursuant to this part:

- (1) the lawsuit must be brought in the district court in the county in which the claimant's employer maintains a place of business;
- (2) the lawsuit may be initiated only by a person claiming a right or benefit under this part or by the state attorney general as provided in 10-1-1018;
- (3) only an employer may be a necessary party respondent;
- (4) the lawsuit must be commenced within 3 years of when the claimant can reasonably be expected to have discovered the facts constituting a violation of the claimant's rights or benefits pursuant to this part; and
- (5) the court shall order a speedy hearing and shall advance the case on the court's calendar.

**10-1-1021. Court remedies.** (1) In a lawsuit initiated pursuant to this part, the court may provide one or more of the following remedies:

- (a) require the employer to comply with the provisions of this part;
- (b) require the employer to compensate the complainant for losses suffered by the complainant because of the employer's violation; or
- (c) if the court finds that the employer's violation was done willfully, as defined in 1-1-204, require the employer to pay compensation under subsection (1)(b) as liquidated damages.

(2) If the complainant is the prevailing party, the court may award reasonable attorney fees to the complainant.

(3) The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of a person under this part.

**10-1-1022. Special revenue account for payment to claimants.**

(1) There is an account in the state special revenue fund to the credit of the department of justice for the payment of compensation awarded by a court pursuant to 10-1-1021.

(2) In a lawsuit by the state attorney general under 10-1-1018, if paid compensation or liquidated damages are awarded, the money awarded must be deposited in the state special revenue account and be paid from the account directly to the complainant on order of the state attorney general.

(3) If payment cannot be made to a complainant within 3 years, the payment must be forwarded to the Montana department of revenue and classified as unclaimed property subject to the provisions of Title 70, chapter 9, part 8.



**MILITARY AFFAIRS AND DISASTER  
AND EMERGENCY SERVICES**

**10-1-1023 through 10-1-1026 reserved.**

**10-1-1027. Rulemaking authority.** The department and the department of justice may adopt rules to implement the provisions of this part.

**TITLE 18**

**PUBLIC CONTRACTS**

**CHAPTER 2**

**CONSTRUCTION CONTRACTS**

**Part 4 – Special Conditions -- Labor**

**18-2-401. Definitions.** Unless the context requires otherwise, in this part, the following definitions apply:

**(1)** A “bona fide resident of Montana” is a person who, at the time of employment and immediately prior to the time of employment, has lived in this state in a manner and for a time that is sufficient to clearly justify the conclusion that the person’s past habitation in this state has been coupled with an intention to make it the person’s home. Persons who come to Montana solely in pursuance of any contract or agreement to perform labor may not be considered to be bona fide residents of Montana within the meaning and for the purpose of this part.

**(2)** “Commissioner” means the commissioner of labor and industry provided for in 2-15-1701.

**(3) (a)** “Construction services” means work performed by an individual in construction, heavy construction, highway construction, and remodeling work.

**(b)** The term does not include:

**(i)** engineering, superintendence, management, office, or clerical work on a public works contract; or

**(ii)** consulting contracts, contracts with commercial suppliers for goods and supplies, or contracts with professionals licensed under state law.

**(4)** “Contractor” means any general contractor, subcontractor, firm, association, partnership, corporation, limited liability partnership, or limited liability company engaged in construction services.

**(5)** “Department” means the department of labor and industry provided for in 2-15-1701.

**(6)** “District” means a prevailing wage rate district established as provided in 18-2-411.

**(7)** “Employer” means any firm, association, partnership, corporation, limited liability partnership, or limited liability company engaged in nonconstruction services.

**(8)** “Heavy and highway construction wage rates” means wage rates, including fringe benefits for health and welfare and pension contributions, that meet the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor and zone pay and travel allowance that are determined and established statewide for heavy and highway construction projects, such as alteration or repair of roads,

streets, highways, alleys, runways, trails, parking areas, utility rights-of-way, staging yards located on or off the right-of-way, or new or reopened pits that produce aggregate, asphalt, concrete, or backfill when the pit does not normally sell to the general public.

**(9)** "Nonconstruction services" means work performed by an individual, not including management, office, or clerical work, for:

- (a)** the maintenance of publicly owned buildings and facilities, including public highways, roads, streets, and alleys;
- (b)** custodial or security services for publicly owned buildings and facilities;
- (c)** grounds maintenance for publicly owned property;
- (d)** the operation of public drinking water supply, waste collection, and waste disposal systems;
- (e)** law enforcement, including janitors and prison guards;
- (f)** fire protection;
- (g)** public or school transportation driving;
- (h)** nursing, nurse's aid services, and medical laboratory technician services;
- (i)** material and mail handling;
- (j)** food service and cooking;
- (k)** motor vehicle and construction equipment repair and servicing; and
- (l)** appliance and office machine repair and servicing.

**(10)** "Project location" means the construction site where a public works project involving construction services is being built, installed, or otherwise improved or reclaimed, as specified on the project plans and specifications.

**(11)** **(a)** "Public works contract" means a contract for construction services let by the state, county, municipality, school district, or political subdivision or for nonconstruction services let by the state, county, municipality, or political subdivision in which the total cost of the contract is in excess of \$25,000. The nonconstruction services classification does not apply to any school district that at any time prior to April 27, 1999, contracted with a private contractor for the provision of nonconstruction services on behalf of the district.

**(b)** The term does not include contracts entered into by the department of public health and human services for the provision of human services.

**(12)** "Special circumstances" means all work performed at a facility that is built or developed for a specific Montana public works project and that is located in a prevailing wage district that contains the project location or that is located in a contiguous prevailing wage district.

**(13)** **(a)** "Standard prevailing rate of wages" or "standard prevailing wage" means:

- (i)** the heavy and highway construction wage rates applicable to heavy and highway construction projects; or
- (ii)** those wages, other than heavy and highway construction wages, including fringe benefits for health and welfare and pension contributions, that meet the requirements of the Employee Retirement Security Act of 1974 and other bona fide programs approved by the United States department of labor and travel allowance that are paid in the district by other contractors for work of

a similar character performed in that district by each craft, classification, or type of worker needed to complete a contract under this part. In each district, the standard prevailing rate of wages must be computed by the department based on work performed by electrical contractors who are licensed under Title 37, chapter 68, master plumbers who are licensed under Title 37, chapter 69, part 3, and Montana contractors who are registered under Title 39, chapter 9, and whose work is performed according to commercial building codes. The contractor survey must include information pertaining to the number of skilled craftspersons employed in the employer's peak month of employment and the wages and benefits paid for each craft. In setting the prevailing wages from the survey for each craft, the department shall use the weighted average wage for each craft, except in those cases in which the survey shows that 50% of the craftspersons are receiving the same wage. When the survey shows that 50% of the craftspersons are receiving the same wage, that wage is the prevailing wage for that craft. The work performed must be work of a similar character to the work performed in the district unless the annual survey of construction contractors and the biennial survey of nonconstruction service employers in the district does not generate sufficient data. If the survey produces insufficient data, the rate may be established by the use of other information or methods that the commissioner determines fairly establish the standard prevailing rate of wages. The commissioner shall establish by rule the method or methods by which the standard prevailing rate of wages is determined. The rules must establish a process for determining if there is insufficient data generated by the survey of employers in the district that requires the use of other methods of determining the standard prevailing rate of wages. The rules must identify the amount of data that constitutes insufficient data and require the commissioner of labor to use other methods of determining the standard prevailing rate of wages when insufficient data exists. The alternative methods of determining the prevailing rate of wages must provide for review and the incorporation of data from work of a similar character that is conducted as near as possible to the original district.

**(b)** When work of a similar character is not being performed in the district, the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that meets the requirements of the Employee Retirement Security Act of 1974 and other bona fide programs approved by the United States department of labor and the rate of travel allowance must be those rates established by collective bargaining agreements in effect in the district for each craft, classification, or type of worker needed to complete the contract.

**(14)** "Work of a similar character" means work on private commercial projects as well as work on public projects.

**18-2-402. Standard prevailing rate of wages. (1)** The Montana commissioner of labor may determine the standard prevailing rate of wages applicable to public works contracts under this part. The commissioner shall undertake to keep and maintain copies of collective bargaining agreements and other information on which the rates are based.

(2) The provisions of this part do not apply in those instances where the standard prevailing rate of wages is determined pursuant to federal law.

(3) In no instances where this part is applicable shall the standard prevailing rate of wage be determined to be greater than the applicable rate of wage in the area for the particular work in question as negotiated under existing and current collective bargaining agreements.

**18-2-403. Preference of Montana labor in public works -- wages -- tax-exempt project -- federal exception.** (1) In every public works contract, there must be inserted in the bid specification and the public works contract a provision requiring the contractor to give preference to the employment of bona fide residents of Montana in the performance of the work.

(2) All public works contracts for construction services under subsection (1), except those for heavy and highway construction, that are conducted at the project location or under special circumstances must contain a provision requiring the contractor to pay:

(a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and

(b) the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that:

(i) meets the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor; and

(ii) is in effect and applicable to the district in which the work is being performed.

(3) In every public works contract for heavy and highway construction, there must be inserted a provision to require the contractor to pay the heavy and highway construction wage rates established statewide for heavy and highway construction services conducted at the project location or under special circumstances.

(4) Except as provided in subsection (5), all public works contracts for nonconstruction services under subsection (1) must contain a provision requiring the contractor to pay:

(a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and

(b) the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that:

(i) meets the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor; and

(ii) is in effect and applicable to the district in which the work is being performed.

(5) An employer who, as a nonprofit organization providing individuals with vocational rehabilitation, performs a public works contract for nonconstruction services and who employs an individual whose earning capacity is impaired by a

mental, emotional, or physical disability may pay the individual wages that are less than the standard prevailing wage if the employer complies with the provisions of section 214(c) of the Fair Labor Standards Act of 1938, 29 U.S.C. 214 and 29 CFR, part 525, and the wages paid are equal to or above the minimum wage required in 39-3-404.

(6) Transportation of goods, supplies, materials, and manufactured or fabricated items to or from the project location is not subject to payment of the standard prevailing rate of wages.

(7) A contract, other than a public works contract, let for a project costing more than \$25,000 and financed from the proceeds of bonds issued under Title 17, chapter 5, part 15, or Title 90, chapter 5 or 7, must contain a provision requiring the contractor to pay the standard prevailing wage rate in effect and applicable to the district in which the work is being performed unless the contractor performing the work has entered into a collective bargaining agreement covering the work to be performed.

(8) A public works contract may not be let to any person, firm, association, or corporation refusing to execute an agreement with the provisions described in subsections (1) through (7) in it, provided that in public works contracts involving the expenditure of federal-aid funds, this part may not be enforced in a manner as to conflict with or be contrary to the federal statutes prescribing a labor preference to honorably discharged veterans of the armed forces and prohibiting as unlawful any other preference or discrimination among citizens of the United States.

(9) Failure to include the provisions required by 18-2-422 in a public works contract relieves the contractor from the contractor's obligation to pay the standard prevailing wage rate and places the obligation on the public contracting agency.

**18-2-404. Approval of public works contract -- bond.** (1) All public works contracts under this part must be approved in writing by the legal adviser of the contracting county, municipal corporation, school district, assessment district, or special improvement district body or officer prior to execution by the contracting public officer or officers.

(2) In all public works contracts entered into under the provisions of this part, at least \$1,000 of the contract price must be withheld at all times until the termination of the public works contract.

**18-2-406. Posting wage scale and fringe benefits.** The contractor performing work or providing construction services under public works contracts, as provided in this part, shall post in a prominent and accessible site on the project or staging area, not later than the first day of work and continuing for the entire duration of the project, a legible statement of all wages and fringe benefits to be paid to the employees.

**18-2-407. Forfeiture for failure to pay standard prevailing wage.** (1) Except as provided in 18-2-403, a contractor, subcontractor, or employer who pays workers or employees at less than the standard prevailing wage as established

under the public works contract shall forfeit to the department a penalty at a rate of up to 20% of the delinquent wages plus fringe benefits, attorney fees, audit fees, and court costs. Money collected by the department under this section must be deposited in the general fund. A contractor, subcontractor, or employer shall also forfeit to the employee the amount of wages owed plus \$25 a day for each day that the employee was underpaid.

(2) Whenever it appears to the contracting agency or to the Montana commissioner of labor and industry that there is insufficient money due to the contractor or the employer under the terms of the contract to cover penalties, the Montana commissioner of labor and industry may, within 90 days after the filing of notice of completion of the project and its acceptance by the contracting agency, maintain an action in district court to recover all penalties and forfeitures due. This part does not prevent the individual worker who has been underpaid or the commissioner of labor and industry on behalf of all the underpaid workers from maintaining an action for recovery of the wages due under the contract as provided in Title 39, chapter 3, part 2, except that appeal of the hearings officer's decision is made directly to district court rather than to the board of personnel appeals.

**18-2-408. Renumbered 18-2-432.** Code Commissioner, 1985.

**18-2-409. Montana residents to be employed on state construction contracts.** (1) On any state construction project funded by state or federal funds, except a project partially funded with federal aid money from the United States department of transportation or when residency preference laws are specifically prohibited by federal law and to which the state is a signatory to the construction contract, each contractor shall ensure that at least 50% of the contractor's workers performing labor on the project are bona fide Montana residents, as defined in 18-2-401.

(2) For any contract awarded for a state construction project, except a project partially funded with federal aid money from the United States department of transportation or when residency preference laws are specifically prohibited by federal law, there must be inserted in the bid specification and the contract a provision, in language approved by the commissioner of labor and industry, implementing the requirements of subsection (1). The bid specification and the contract must provide that at least 50% of the workers on the project will be bona fide Montana residents. If due to a lack of qualified personnel each contractor cannot guarantee that at least 50% of the contractor's workers on the project will be Montana residents, the contract must provide that the percentage that the commissioner of labor and industry believes possible will be Montana residents.

(3) The commissioner of labor and industry shall enforce this section and investigate complaints of its violation and may adopt rules to implement this section.

**18-2-410 reserved.**

**18-2-411. Creation of prevailing wage rate districts.** (1) Without taking into consideration heavy and highway construction wage rates, the commissioner shall divide the state into at least 10 prevailing wage rate districts.

(2) In initially determining the districts, the commissioner must:

(a) follow the rulemaking procedures in the Montana Administrative Procedure Act; and

(b) publish the reasons supporting the creation of each district.

(3) A district boundary may not be changed except for good cause and in accordance with the rulemaking procedures in the Montana Administrative Procedure Act.

(4) The presence of collective bargaining agreements in a particular area may not be the sole basis for the creation of boundaries of a district, nor may the absence of collective bargaining agreements in a particular area be the sole basis for changing the boundaries of a district.

(5) For each prevailing wage rate district established under this section, the commissioner shall determine the standard prevailing rate of wages to be paid employees, as provided in 18-2-401 and 18-2-402. The standard prevailing rate of wages for construction services, as determined by the commissioner in this subsection, must be used for calculating an apprentice's wage, as provided in 39-6-108.

**18-2-412. Method for payment of standard prevailing wage.** (1) To fulfill the obligation to pay the standard prevailing rate of wages under 18-2-403, a contractor or subcontractor may:

(a) pay the amount of fringe benefits and the basic hourly rate of pay that is part of the standard prevailing rate of wages directly to the worker or employee in cash;

(b) make an irrevocable contribution to a trustee or a third person pursuant to a fringe benefit fund, plan, or program that meets the requirements of the Employee Retirement Income Security Act of 1974 or that is a bona fide program approved by the United States department of labor; or

(c) make payments using any combination of methods set forth in subsections (1)(a) and (1)(b) so that the aggregate of payments and contributions is not less than the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions that meet the requirements of the Employee Retirement Income Security Act of 1974, travel, or other bona fide programs approved by the United States department of labor, that is applicable to the district for the particular type of work being performed.

(2) The fringe benefit fund, plan, or program described in subsection (1)(b) must provide benefits to workers or employees for health care, pensions on retirement or death, life insurance, disability and sickness insurance, or bona fide programs that meet the requirements of the Employee Retirement Income Security Act of 1974 or that are approved by the United States department of labor.



(3) A private contractor or subcontractor shall file a copy of the fringe benefit fund, plan, or program described in subsection (2) with the department.

**18-2-413 through 18-2-420 reserved.**

**18-2-421. Notice.** When a public works project is accepted by the public contracting agency, a notice of acceptance and the completion date of the project must be sent to the department. However, in the case of public works contracts that amount to \$50,000 or less in cost, the notice of acceptance and the completion date of the project is not required unless the department requests that information. The 90-day limitation for filing an action in district court, as provided in 18-2-407, does not begin until the public contracting agency notifies the department of its acceptance of the public works project.

**18-2-422. Bid specification and public works contract to contain standard prevailing wage rate and payroll record notification.** All public works contracts and the bid specifications for those contracts must contain:

(1) a provision stating for each job classification the standard prevailing wage rate, including fringe benefits, that the contractors and employers shall pay during construction of the project;

(2) a provision requiring each contractor and employer to maintain payroll records in a manner readily capable of being certified for submission under 18-2-423, for not less than 3 years after the contractor's or employer's completion of work on the project; and

(3) a provision requiring each contractor to post a statement of all wages and fringe benefits in compliance with 18-2-423.

**18-2-423. Submission of payroll records.** If a complaint is filed with the department alleging noncompliance with 18-2-422, the department may require the project to submit to it certified copies of the payroll records for workers employed on that project. A contractor or a subcontractor shall pay employees receiving an hourly wage on a weekly basis. If a wage violation complaint is filed with the department, the contractor or subcontractor shall provide the employee's payroll records to the department within 5 days of receiving the payroll request from the department.

**18-2-424. Enforcement.** If a contractor or a subcontractor refuses to submit payroll records requested by the department pursuant to 18-2-423, the commissioner or his authorized representative may issue subpoenas compelling the production of those records.

**18-2-425. Prohibition -- project labor agreement.** (1) Except as otherwise provided in this chapter, the state or any political subdivision that contracts for the construction, maintenance, repair, or improvement of public works may not require that a contractor, subcontractor, or material supplier or carrier

engaged in the construction, maintenance, repair, or improvement of public works execute or otherwise become a party to any project labor agreement, collective bargaining agreement, prehire agreement, or other agreement with employees, their representatives, or any labor organization as a condition of bidding, negotiating, being awarded, or performing work on a public works contract.

(2) For the purposes of this section, "public works" means:

(a) a building, road, street, sewer, storm drain, water system, irrigation system, reclamation project, or other facility owned or to be contracted for by the state or a political subdivision and that is paid for in whole or in part with tax revenue paid by residents of the state; or

(b) any other construction service or nonconstruction service as defined in 18-2-401.

**18-2-426 through 18-2-430 reserved.**

**18-2-431. Rulemaking authority.** The commissioner may adopt rules necessary to implement this part.

**18-2-432. Penalty for violation. (1) (a)** If a person, firm, or corporation fails to comply with the provisions of this part, the state, county, municipality, school district, or officer of a political subdivision that executed the public works contract shall retain \$1,000 of the contract price as liquidated damages for the violation of the terms of the public works contract, and the money must be credited to the proper funds of the state, county, municipality, school district, or political subdivision.

(b) If a person, firm, or corporation fails to comply with the provisions of this part due to gross negligence, as determined by the commissioner, the commissioner may retain up to an additional \$10,000 above the amount provided for in subsection (1)(a) as a penalty for the violation of the terms of the public works contract. The money retained pursuant to this subsection (1)(b) must be credited to the proper funds of the state, county, municipality, school district, or other political subdivision.

(2) Whenever a contractor or subcontractor is found by the commissioner to have aggravatedly or willfully violated the labor standards provisions of this chapter, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest is ineligible, for a period not to exceed 3 years after the date of the final judgment, to receive any public works contracts or subcontracts that are subject to the provisions of this chapter.

(3) Whenever an action has been instituted in a district court in this state against any person, firm, or corporation for the violation of this part, the court in which the action is pending is authorized to issue an injunction to restrain the person, firm, or corporation from proceeding with a public works contract with the state, county, municipality, school district, or political subdivision, pending the final determination of the instituted action.

## TITLE 39

### LABOR

#### CHAPTER 1

#### DEPARTMENT OF LABOR AND INDUSTRY

##### Part 1 – General Provisions

**39-1-101. Definitions.** As used in this chapter, unless the context requires otherwise the following definitions apply:

(1) "Commissioner" means the commissioner of labor and industry as provided for in 2-15-1701.

(2) "Department" means the department of labor and industry as provided for in 2-15-1701.

**39-1-102. Duties of department.** The department shall enforce all the laws of Montana relating to hours of labor, conditions of labor, prosecution of employers who default in payment of wages, protection of employees, and all laws relating to child labor that regulate the employment of children in any manner and shall administer the laws of the state relating to free employment offices and all other state labor laws. The department shall investigate and enforce the laws prohibiting discrimination contained in Title 49, chapters 2 and 3, and provide a means for conciliation between parties.

**39-1-103. Powers of department.** (1) In discharging the duties imposed upon the department, the commissioner or his authorized representatives may administer oaths, examine witnesses under oath, take depositions or cause same to be taken, depute any citizen 18 years of age or older to serve subpoenas upon witnesses, and issue subpoenas for the attendance of witnesses before him in the same manner as for attendance before district courts.

(2) The commissioner may likewise cause to be inspected any mine, factory, workshop, smelter, mill, warehouse, elevator, foundry, machine shop, or other industrial establishment.

(3) Nothing in this chapter applies to labor violations preempted by federal law or regulation.

**39-1-104. Cooperation with federal government.** The department may and is hereby authorized to assist and cooperate with the wage and hour division and the children's bureau, U.S. department of labor, in the enforcement within this state of the Fair Labor Standards Act of 1938, approved June 25, 1938, and, subject to the regulations of the administrator of the wage and hour division or the chief of the children's bureau, as the case may be, and the laws of the state

applicable to the receipt and expenditure of moneys, may be reimbursed by said wage and hour division or said children's bureau for the reasonable cost of such assistance and cooperation.

## CHAPTER 2

### THE EMPLOYMENT RELATIONSHIP

#### Part 1 – General Provisions

**39-2-101. Employment defined.** The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person.

**39-2-102. What belongs to employer.** Everything which an employee acquires by virtue of his employment, except the compensation, if any, which is due to him from his employer, belongs to the latter, whether acquired lawfully or unlawfully or during or after the expiration of the term of his employment.

**39-2-103. Confidential employment.** The obligations peculiar to confidential employments are defined in the laws relating to trusts and fiduciary relationships.

#### Part 2 – General Obligations of Employers

**39-2-201. Seats for employees. (1)** Every employer in any manufacturing, mechanical, or mercantile establishment; laundry, hotel, or restaurant; or other establishment employing any person shall provide suitable seats for all employees and shall permit them to use such seats when they are not employed in the active duties of their employment.

**(2)** Any employer who shall fail, neglect, or refuse to provide suitable seats, as provided in this section, or who shall permit or suffer any overseer, superintendent, or other agent of any such employer to violate any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined for each offense not less than \$50 or more than \$200 or be imprisoned in the county jail for a period of not less than 10 or more than 60 days or both such fine and imprisonment.

**39-2-202 through 39-2-204 reserved.**

**39-2-205. Short title.** Sections 39-2-205 through 39-2-211 may be cited as the "Workforce Drug and Alcohol Testing Act".

**39-2-206. Definitions.** As used in 39-2-205 through 39-2-211, the following definitions apply:

(1) "Alcohol" means an intoxicating agent in alcoholic beverages, ethyl alcohol, also called ethanol, or the hydrated oxide of ethyl.

(2) "Alcohol concentration" means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath, as indicated by an evidential breath test.

(3) "Controlled substance" means a dangerous drug, as defined in 49 CFR, part 40, except a drug used pursuant to a valid prescription or as authorized by law.

(4) "Employee" means an individual engaged in the performance, supervision, or management of work in a hazardous work environment, security position, position affecting public safety, or fiduciary position for an employer and does not include an independent contractor. The term includes an elected official.

(5) "Employer" means a person or entity that has one or more employees and that is located in or doing business in Montana.

(6) "Hazardous work environment" includes but is not limited to positions:

(a) for which controlled substance and alcohol testing is mandated by federal law, such as aviation, commercial motor carrier, railroad, pipeline, and commercial marine employees;

(b) that involve the operation of or work in proximity to construction equipment, industrial machinery, or mining activities; or

(c) that involve handling or proximity to flammable materials, explosives, toxic chemicals, or similar substances.

(7) "Medical review officer" means a licensed physician trained in the field of substance abuse.

(8) "Prospective employee" means an individual who has made a written or oral application to an employer to become an employee.

(9) "Qualified testing program" means a program to test for the presence of controlled substances and alcohol that meets the criteria set forth in 39-2-207 and 39-2-208.

(10) "Sample" means a urine specimen, a breath test, or oral fluid obtained in a minimally invasive manner and determined to meet the reliability and accuracy criteria accepted by laboratories for the performance of drug testing that is used to determine the presence of a controlled substance or alcohol.

**39-2-207. Qualified testing program.** A qualified testing program must comply with the following criteria:

(1) Testing must be conducted according to the terms of written policies and procedures that must be adopted by the employer and must be available for review by all employees 60 days before the terms are implemented or changed. Controlled substance and alcohol testing procedures for samples that are covered by 49 CFR,

part 40, must conform to 49 CFR, part 40. For samples that are not covered by 49 CFR, part 40, the qualified testing program must contain chain-of-custody and other procedural requirements that are at least as stringent as those contained in 49 CFR, part 40, and the testing methodology must be cleared by the United States food and drug administration. At a minimum, the policies and procedures must require:

(a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful manufacture, distribution, possession, or use of a controlled substance;

(b) the employer's program for regularly educating or providing information to employees on the health and workplace safety risks associated with the use of controlled substances and alcohol;

(c) the employer's standards of conduct that regulate the use of controlled substances and alcohol by employees;

(d) a description of available employee assistance programs, including drug and alcohol counseling, treatment, or rehabilitation programs that are available to employees;

(e) a description of the sanctions that the employer may impose on an employee if the employee is found to have violated the standards of conduct referred to in subsection (1)(c) or if the employee is found to test positive for the presence of a controlled substance or alcohol;

(f) identification of the types of controlled substance and alcohol tests to be used from the types of tests listed in 39-2-208;

(g) a list of controlled substances for which the employer intends to test and a stated alcohol concentration level above which a tested employee must be sanctioned;

(h) a description of the employer's hiring policy with respect to prospective employees who test positive;

(i) a detailed description of the procedures that will be followed to conduct the testing program, including the resolution of a dispute concerning test results;

(j) a provision that all information, interviews, reports, statements, memoranda, and test results are confidential communications that may not be disclosed to anyone except:

(i) the tested employee;

(ii) the designated representative of the employer; or

(iii) in connection with any legal or administrative claim arising out of the employer's implementation of 39-2-205 through 39-2-211 or in response to inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500, when there is reason to believe that the tested employee may have caused or contributed to the accident; and

(k) a provision that information obtained through testing that is unrelated to the use of a controlled substance or alcohol must be held in strict confidentiality by the medical review officer and may not be released to the employer.

(2) In addition to imposing appropriate sanctions on an employee for violation of the employer's standards of conduct, an employer may require an

employee who tests positive on a test for controlled substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation program as a condition of continued employment. An employer may require the employee to submit to periodic followup testing as a condition of the counseling, treatment, or rehabilitation program.

(3) Testing must be at the employer's expense, and all employees must be compensated at the employee's regular rate, including benefits, for time attributable to the testing program.

(4) The collection, transport, and confirmation testing of urine samples must be performed in accordance with 49 CFR, part 40, and the collection, transport, and confirmation testing of nonurine samples must be as stringent as the requirements of 49 CFR, part 40, in requiring split specimens as defined by the United States department of health and human services, requiring transport to a testing facility under the chain of custody, and requiring confirmation of all screened positive results using mass-spectrometry technology.

(5) Before an employer may take any action based on a positive test result, the employer shall have the results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An employee or prospective employee must be given the opportunity to provide notification to the medical review officer of any medical information that is relevant to interpreting test results, including information concerning currently or recently used prescription or nonprescription drugs.

(6) Breath alcohol tests must be administered by a certified breath alcohol technician and may only be conducted using testing equipment that appears on the list of conforming products published in the Federal Register.

(7) A breath alcohol test result must indicate an alcohol concentration of greater than 0.04 for a person to be considered as having alcohol in the person's body.

**39-2-208. Qualified testing program -- allowable types -- procedures.** Each of the following activities is permissible in the implementation of a qualified testing program:

(1) An employer may test any prospective employee as a condition of hire.

(2) An employer may use random testing if the employer's controlled substance and alcohol policy includes one or both of the following procedures:

(a) An employer or an employer's representative may establish a date when all salaried and wage-earning employees will be required to undergo controlled substance or alcohol tests, or both.

(b) An employer may manage or contract with a third party to establish and administer a random testing process that must include:

(i) an established calendar period for testing;

(ii) an established testing rate within the calendar period;

(iii) a random selection process that will determine who will be tested on any given date during the calendar period for testing;

(iv) all supervisory and managerial employees in the random selection and

testing process; and

(v) a procedure that requires the employer to obtain a signed statement from each employee that confirms that the employee has received a written description of the random selection process and that requires the employer to maintain the statement in the employee's personnel file. The selection of employees in a random testing procedure must be made by a scientifically valid method, such as a random number table or a computer-based random number generator table.

(3) An employer may require an employee to submit to followup tests if the employee has had a verified positive test for a controlled substance or for alcohol. The followup tests must be described in the employer's controlled substance and alcohol policy and may be conducted for up to 1 year from the time that the employer first requires a followup test.

(4) An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to suspect that an employee's faculties are impaired on the job as a result of the use of a controlled substance or alcohol consumption. An employer shall comply with the supervisory training requirement in 49 CFR, part 382.603, whenever the employer requires a test on the basis of reasonable suspicion.

(5) An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to believe that the employee's act or failure to act is a direct or proximate cause of a work-related accident that has caused death or personal injury or property damage in excess of \$1,500.

**39-2-209. Employee's right of rebuttal.** The employer shall provide an employee who has been tested under any qualified testing program described in 39-2-208 with a copy of the test report. The employer is also required to obtain, at the employee's request, an additional test of the split sample by an independent laboratory selected by the person tested. The employer shall pay for the additional tests if the additional test results are negative, and the employee shall pay for the additional tests if the additional test results are positive. The employee must be provided the opportunity to rebut or explain the results of any test.

**39-2-210. Limitation on adverse action.** No adverse action, including followup testing, may be taken by the employer if the employee presents a reasonable explanation or medical opinion indicating that the original test results were not caused by illegal use of controlled substances or by alcohol consumption. If the employee presents a reasonable explanation or medical opinion, the test results must be removed from the employee's record and destroyed.

**39-2-211. Confidentiality of results.** (1) Except as provided in subsection (2) and except for information that is required by law to be reported to a state or federal licensing authority, all information, interviews, reports, statements, memoranda, or test results received by an employer through a qualified testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding.



(2) Material that is confidential under subsection (1) may be used in a proceeding related to:

(a) legal action arising out of an employer's implementation of 39-2-205 through 39-2-211; or

(b) inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500 when there is reason to believe that the tested employee may have caused or contributed to the accident.

**39-2-212 through 39-2-214 reserved.**

**39-2-215. Public employer policy on support of women and breastfeeding -- unlawful discrimination.** (1) All state and county governments, municipalities, and school districts and the university system must have a written policy supporting women who want to continue breastfeeding after returning from maternity leave. The policy must state that employers shall support and encourage the practice of breastfeeding, accommodate the breastfeeding-related needs of employees, and ensure that employees are provided with adequate facilities for breastfeeding or the expression of milk for their children. At a minimum, the policy must identify the means by which an employer will make available a space suitable for breastfeeding and breast pumping for a lactating employee, including the provision of basic necessities of privacy, lighting, and electricity for the pump apparatus. The space does not need to be fully enclosed or permanent, but must be readily available during the term that the employee needs the space.

(2) It is an unlawful discriminatory practice for any public employer:

(a) to refuse to hire or employ or to bar or to discharge from employment an employee who expresses milk in the workplace; or

(b) to discriminate against an employee who expresses milk in the workplace in compensation or in terms, conditions, or privileges of employment unless based upon a bona fide occupational qualification.

**39-2-217. Break time for nursing mothers.** All state and county governments, municipalities, and school districts and the university system shall provide reasonable unpaid break time each day to an employee who needs to express breast milk for the employee's child, as provided in 39-2-215 and 39-2-216, if breaks are currently allowed. If breaks are not currently allowed, the public employer shall consider each case and make accommodations as possible. The break time must, if possible, run concurrently with any break time already provided to the employee. A public employer is not required to provide break time under this section if to do so would unduly disrupt the public employer's operations.

### Part 3 – General Prohibitions on Employers

**39-2-301. Unlawful for employer to require employee to pay cost of medical examination as condition of employment.** (1) It shall be unlawful for any employer to require any employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any records of such examination as a condition of employment.

(2) The term “employer”, as used in this section, shall mean and include an individual, a partnership, an association, a corporation, a legal representative, trustee, receiver, trustee in bankruptcy, and any common carrier by rail, motor, water, air, or express company doing business in or operating within the state.

(3) The term “employee”, as used in this section, shall mean and include any person who may be permitted, required, or directed by any employer, as defined in subsection (2) of this section, in consideration of direct or indirect gain or profit to engage in any employment.

(4) Any employer violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine in any sum not exceeding \$100 for each such offense.

**39-2-302. Discharge or layoff of employee because of attachment or garnishment prohibited.** No employer shall discharge or lay off an employee because of attachment or garnishment served on the employer against the wages of the employee.

**39-2-303. Deception as to character of employment, conditions of work, or existence of labor dispute prohibited.** (1) No one doing business in this state shall induce, influence, persuade, or engage workmen to change from one place to another in this state through or by means of deception, misrepresentation, or false advertising concerning the kind or character of the work, the sanitary or other conditions of employment, or as to the existence of a strike or other trouble pending between the employer and the employees at the time of or immediately prior to such engagement. Failure to state in any advertisement, proposal, or contract for the employment of workmen that there is a strike, lockout, or other labor trouble at the place of the proposed employment when in fact such strike, lockout, or other trouble then actually exists at such place shall be deemed a false advertisement and misrepresentation for the purpose of this section.

(2) Any workman influenced, induced, persuaded, or engaged through or by means of any of the things prohibited by subsection (1) of this section has a right of action for recovery of all damages that he had sustained in consequence of the deception, misrepresentation, or false advertising used to induce him to change his place of employment against anyone directly or indirectly procuring such change, and in addition thereto, he shall recover reasonable attorneys’ fees to be fixed by the court and taxed as costs in any judgment recovered.

**39-2-304. Lie detector tests prohibited.** A person, firm, corporation, or other business entity or its representative may not require a person to take a polygraph test or any form of a mechanical lie detector test as a condition for employment or continuation of employment.

**39-2-305. Employment of aliens not lawfully authorized to accept employment prohibited.** (1) No employer may knowingly employ an alien who is not lawfully authorized to accept employment.

(2) A person convicted of violating this section shall be fined no more than \$300.

(3) The department of labor and industry or a person harmed by a violation of this section may sue to enjoin an employer from violating this section and to gain other appropriate relief.

**39-2-306. Employment of persons under eighteen as bartenders prohibited.** (1) No person under 18 years of age shall be employed as a bartender, waiter, or waitress whose duty is to serve customers purchasing liquors, beer, or wines in any establishment which sells liquors, beer, or wines at retail.

(2) Any retail vendor of liquors, beer, or wines who employs any such person under the age of 18 years is guilty of a misdemeanor.

**39-2-307 through 39-2-312 reserved.**

**39-2-313. Discrimination prohibited for use of lawful product during nonworking hours -- exceptions.** (1) For purposes of this section, "lawful product" means a product that is legally consumed, used, or enjoyed and includes food, beverages, and tobacco.

(2) Except as provided in subsections (3) and (4), an employer may not refuse to employ or license and may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally uses a lawful product off the employer's premises during nonworking hours.

(3) Subsection (2) does not apply to:

(a) use of a lawful product that:

(i) affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees; or

(ii) conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment;

(b) an individual who, on a personal basis, has a professional service contract with an employer and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products; or

(c) an employer that is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.

(4) An employer does not violate this section if the employer takes

action based on the belief that the employer's actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement.

(5) An employer may offer, impose, or have in effect a health, disability, or life insurance policy that makes distinctions between employees for the type or price of coverage based on the employees' use of a product if:

(a) differential rates assessed against employees reflect actuarially justified differences in providing employee benefits;

(b) the employer provides an employee with written notice delineating the differential rates used by the employer's insurance carriers; and

(c) the distinctions in the type or price of coverage are not used to expand, limit, or curtail the rights or liabilities of a party in a civil cause of action.

**39-2-314. Civil action limitation.** (1) Except as provided in subsection (2), an individual who is discharged, discriminated against, or denied employment in violation of 39-2-313 may file a civil action against an employer within 1 year of the alleged violation and the court may require any reasonable measure to correct the discriminatory practice and to rectify the harm, pecuniary or otherwise, to the person discriminated against and may allow reasonable attorney fees to the prevailing party.

(2) Prior to filing a civil action under subsection (1), an employee shall, within 120 days of the alleged violation, initiate any internal grievance procedure available. If a grievance procedure is not exhausted within 120 days, the employee may file a civil action.

## **Part 4 – General Obligations of Employees**

**39-2-401. Duties of gratuitous employee.** (1) One who without consideration undertakes to do a service for another is not bound to perform the same, but if he actually enters upon its performance, he must use at least slight care and diligence therein.

(2) One who by his own special request induces another to entrust him with the performance of a service must perform the same fully. In other cases, one who undertakes a gratuitous service may relinquish it at any time.

(3) A gratuitous employee who accepts a written power of attorney must act under it so long as it remains in force or until he gives notice to his employer that he will not do so.

**39-2-402. Duties of employee for reward.** One who for a good consideration agrees to serve another must perform the service and must use ordinary care and diligence therein so long as he is thus employed.

**39-2-403. Duties of employee for his own benefit.** One who is employed at his own request to do that which is more for his own advantage than

for that of his employer must use great care and diligence therein to protect the interest of the latter.

**39-2-404. Employee must obey employer.** An employee must substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful or would impose new and unreasonable burdens upon the employee.

**39-2-405. Employee must conform to usage.** An employee must perform his service in conformity to the usage of the place of performance unless otherwise directed by his employer or unless it is impracticable or manifestly injurious to his employer to do so.

**39-2-406. Degree of skill required. (1)** An employee is bound to exercise a reasonable degree of skill unless his employer has notice before employing him of his want of skill.

**(2)** An employee is always bound to use such skill as he possesses, so far as the same is required, for the service specified.

**39-2-407. Duty to account.** An employee must, on demand, render to his employer as often as may be reasonable just accounts of all his transactions in the course of his service and must, without demand, give prompt notice to his employer of everything which he receives for his account.

**39-2-408. Duty of employee regarding items received on account of his employer.** An employee who receives anything on account of his employer in any capacity other than that of a mere servant is not bound to deliver it to him until demanded and is not at liberty to send it to him from a distance, without demand, in any mode involving greater risk than its retention by the employee himself.

**39-2-409. Preference to be given to employer's business.** An employee who has any business to transact on his own account similar to that entrusted to him by his employer must always give the latter the preference.

**39-2-410. Responsibility of employee for substitute.** An employee who is expressly authorized to employ a substitute is liable to his principal only for want of ordinary care in his selection. The substitute is directly responsible to the principal.

**39-2-411. Surviving employee.** Where service is to be rendered by two or more persons jointly and one of them dies, the survivor must act alone if the service to be rendered is such as he can rightly perform without the aid of the deceased person, but not otherwise.

## Part 5 – Termination of Employment

**39-2-502. Termination by death or incapacity of employer. (1)** Every employment in which the power of the employee is not coupled with an interest in its subject is terminated by notice to him of:

(a) the death of the employer; or

(b) his legal incapacity to contract.

(2) An employee, unless the term of his service has expired or unless he has a right to discontinue it at any time without notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employee for such service according to the terms of the contract of employment.

## Part 6 – Master and Servant

**39-2-601. Servant defined.** A servant is one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling and who in such service remains entirely under the control and direction of the latter, who is called his master.

**39-2-602. Term of hiring. (1)** A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for 1 year; a hiring at a daily rate, for 1 day; a hiring by piecework, for no specified term.

(2) In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month at a monthly rate of reasonable wages, to be paid when the service is performed.

**39-2-603. Renewal of hiring.** Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service.

**39-2-604. Time of service.** The entire time of a domestic servant belongs to the master, and the time of other servants to such extent as is usual in the business in which they serve, not exceeding in any case 10 hours in the day.

**39-2-605. Servant to pay over without demand.** A servant must deliver to his master without demand, as soon as with reasonable diligence he can find him, everything that he receives for his account, but he is not bound without orders from his master to send anything to him through another person.

**39-2-606. When servant may be discharged.** A master may discharge any servant, other than an apprentice, whether engaged for a fixed term or not:

(1) if he is guilty of misconduct in the course of his service or of gross immorality, though unconnected with the same; or

(2) if, being employed about the person of his master or in a confidential position, the master discovers that he has been guilty of misconduct before or after the commencement of his service of such a nature that, if the master had known or contemplated it, he would not have so employed him.

## **Part 7 – General Liability Arising From Employment Relationship**

**39-2-701. Indemnification of employee.** (1) An employer must indemnify his employee, except as prescribed in subsection (2) of this section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such or of his obedience to the directions of the employer, even though unlawful, unless the employee at the time of obeying such directions believed them to be unlawful.

(2) An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed.

(3) An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care.

**39-2-702. Liability of employee for negligence.** An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the latter, and the employer is liable to him for the value of such services only as are properly rendered if the service is not gratuitous.

**39-2-703. Liability of railway corporation for negligence of fellow servants.** (1) Every person or corporation operating a railway or railroad in this state is liable for all damages sustained by any employee of such person or corporation in consequence of the neglect of any other employee thereof or by the mismanagement of any other employee thereof and in consequence of the willful wrongs, whether of commission or omission, of any other employee thereof when such neglect, mismanagement, or wrongs are in any manner connected with the use and operation of any railway or railroad on or about which he is employed. No contract which restricts such liability is legal or binding.

(2) In case of the death of any such employee in consequence of any injury or damage so sustained, the right of action provided by subsection (1) shall survive and may be prosecuted and maintained by his heirs or personal representatives.

(3) Every railway corporation doing business in this state, including electric railway corporations, is liable for damages sustained by an employee thereof within this state, subject to the provisions of 27-1-702, when such damages are caused by the negligence of any train dispatcher, telegraph operator, superintendent, master

mechanic, yardmaster, conductor, engineer, motorman, or any other employee who has superintendence of any stationary or hand signal.

(4) No contract of insurance, relief, benefit, or indemnity in case of injury or death or any other contract entered into, either before or after the injury, between the person injured and any of the employers named in subsection (3) is a bar or defense to any cause of action brought under the provisions of this section, except as otherwise provided in the Workers' Compensation Act.

**39-2-704. Liability of mining company for negligence of fellow servants.** (1) Every company, corporation, or individual operating any mine, smelter, or mill for the refining of ores is liable for damages sustained by any employee thereof within this state, subject to the provisions of 27-1-702, when such damage is caused by the negligence of any superintendent, foreman, shift boss, hoisting or other engineer, or crane man.

(2) No contract of insurance, relief, benefit, or indemnity in case of injury or death or any other contract entered into before the injury between the person injured and any of the employers named in this section is a bar or defense to any cause of action brought under the provisions of this section, except as otherwise provided in the Workers' Compensation Act.

(3) In case of the death of any such employee in consequence of any injury or damages so sustained, the right of action survives and may be prosecuted and maintained by his heirs or personal representatives.

**39-2-705. Contract discharging employer liability for negligence void.** Any contract or agreement entered into by any person, company, or corporation with its servants or employees whereby such person, company, or corporation shall be released or discharged from liability or responsibility on account of personal injuries received by such servants or employees while in the service of such person, company, or corporation, by reason of the negligence of such person, company, or corporation, or the agents or employees thereof, shall be absolutely null and void.

## **Part 8 – Blacklisting and Protection of Discharged Employees**

**39-2-801. Employee to be furnished on demand with reason for discharge.** (1) It is the duty of any person after having discharged any employee from service, upon demand by the discharged employee, to furnish the discharged employee in writing a statement of reasons for the discharge. Except as provided in subsection (3), if the person refuses to do so within a reasonable time after the demand, it is unlawful for the person to furnish any statement of the reasons for the discharge to any person or in any way to blacklist or to prevent the discharged person from procuring employment elsewhere, subject to the penalties and damages prescribed in this part.

(2) A written demand under this part must advise the person who discharged



the employee of the possibility that the statements may be used in litigation.

(3) A response to the demand may be modified at any time and may not limit a person's ability to present a full defense in any action brought by the discharged employee. Failure to provide a response as required under subsection (1) may not limit a person's ability to present a full defense in any action brought by the discharged employee.

**39-2-802. Protection of discharged employees.** If any person, after having discharged an employee from his service, prevents or attempts to prevent by word or writing of any kind such discharged employee from obtaining employment with any other person, such person is punishable as provided in 39-2-804 and is liable in punitive damages to such discharged person, to be recovered by civil action. No person is prohibited from informing by word or writing any person to whom such discharged person or employee has applied for employment a truthful statement of the reason for such discharge.

**39-2-803. Blacklisting prohibited.** If any company or corporation in this state authorizes or allows any of its agents to blacklist or any person does blacklist any discharged employee or attempts by word or writing or any other means whatever to prevent any discharged employee or any employee who may have voluntarily left the company's service from obtaining employment with another person, except as provided for in 39-2-802, such company or corporation or person is liable in punitive damages to such employee so prevented from obtaining employment, to be recovered by him in a civil action, and is also punishable as provided in 39-2-804.

**39-2-804. Violation of part a misdemeanor.** Every person who violates any of the provisions of this part relating to the protection of discharged employees and the prevention of blacklisting is guilty of a misdemeanor.

## **Part 9 – Wrongful Discharge from Employment**

**39-2-901. Short title.** This part may be cited as the "Wrongful Discharge From Employment Act".

**39-2-902. Purpose.** This part sets forth certain rights and remedies with respect to wrongful discharge. Except as provided in 39-2-912, this part provides the exclusive remedy for a wrongful discharge from employment.

**39-2-903. Definitions.** In this part, the following definitions apply:

(1) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge

does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

(2) "Discharge" includes a constructive discharge as defined in subsection (1) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

(3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.

(4) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.

(5) "Good cause" means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4).

(6) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.

(7) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.

### **39-2-904. Elements of wrongful discharge -- presumptive probationary period.** (1) A discharge is wrongful only if:

(a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(c) the employer violated the express provisions of its own written personnel policy.

(2) (a) During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or for no reason.

(b) If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time of hire, there is a probationary period of 6 months from the date of hire.

**39-2-905. Remedies.** (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest on the lost wages and fringe benefits. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from

the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-2-904(1)(a).

(3) There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages, except as provided for in subsections (1) and (2).

**39-2-906 through 39-2-910 reserved.**

**39-2-911. Limitation of actions.** (1) An action under this part must be filed within 1 year after the date of discharge.

(2) If an employer maintains written internal procedures, other than those specified in 39-2-912, under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part. The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under this part. If the employer's internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the employee may file an action under this part and for purposes of this subsection the employer's internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subsection (1) more than 120 days.

(3) If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures and shall supply the discharged employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2).

**39-2-912. Exemptions.** This part does not apply to a discharge:

(1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds.

(2) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

**39-2-913. Preemption of common-law remedies.** Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.

**39-2-914. Arbitration. (1)** A party may make a written offer to arbitrate a dispute that otherwise could be adjudicated under this part.

**(2)** An offer to arbitrate must be in writing and contain the following provisions:

**(a)** A neutral arbitrator must be selected by mutual agreement or, in the absence of agreement, as provided in 27-5-211.

**(b)** The arbitration must be governed by the Uniform Arbitration Act, Title 27, chapter 5. If there is a conflict between the Uniform Arbitration Act and this part, this part applies.

**(c)** The arbitrator is bound by this part.

**(3)** If a complaint is filed under this part, the offer to arbitrate must be made within 60 days after service of the complaint and must be accepted in writing within 30 days after the date the offer is made.

**(4)** A discharged employee who makes a valid offer to arbitrate that is accepted by the employer and who prevails in such arbitration is entitled to have the arbitrator's fee and all costs of arbitration paid by the employer.

**(5)** If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a lawsuit under this part. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act.

**39-2-915. Effect of rejection of offer to arbitrate.** A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer.

## **Part 10 – Closure of of Layoff at Governmental Facility**

**39-2-1002. Definitions.** As used in this part, the following definitions apply:

**(1)** "Closure" means the permanent shutting down of operations at a workplace.

**(2)** "Department" means the department of labor and industry.

**(3)** "Employer" means the state of Montana.

**(4)** "Governmental facility" means any institution, department, agency, bureau, or office operated by the state of Montana and employing more than 25 persons.

**(5)** "Retrenchment" means reducing the number of employees at the governmental facility by at least 250 employees over any 2-year period, provided

that a reduction in the number of employees by attrition is not retrenchment.

**39-2-1003. Requirements for closure or retrenchment.** Upon making a decision to close or retrench, an employer shall:

(1) immediately notify the employees, the affected employee organizations, the affected local governments, and a newspaper of general circulation in the county where the governmental facility subject to closure or retrenchment is located; and

(2) within 90 days, provide the employees, the affected employee organizations, and the affected local governments with a written impact statement that includes information concerning:

- (a) the number of employees affected;
- (b) the amount of the affected employees' payroll;
- (c) the potential tax losses to local governments and school districts;
- (d) the effect on other businesses; and
- (e) the reasons for the closure or retrenchment.

**39-2-1004. Adoption of rules.** The department shall adopt rules to provide procedures for an employer to meet the obligations under 39-2-1003.

## CHAPTER 3

## WAGES AND WAGE PROTECTION

## Part 1 – General Provisions

**39-3-101. Employer to furnish itemized statement of deductions.**

(1) All employers in this state when making payment to employees for salaries or wages shall, upon making such payment, give to the employee an itemized statement setting forth moneys deducted because of state and federal income taxes, social security, or any other deductions together with the amount of each deduction.

(2) Where no deduction is made in such payment of wages or salaries, the employer shall give to the employee a statement that the payment does not include any such deductions.

**39-3-102. Compensation of employee dismissed for cause.** An employee dismissed by his employer for good cause is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract.

**39-3-103. Compensation of employee leaving for cause.** An employee who quits the service of his employer for good cause is entitled to such proportion of the compensation which would become due in case of full performance as the services which he has already rendered bear to the services which he was to render as full performance.

**39-3-104. Equal pay for women for equivalent service.** (1) It is unlawful for the state or any county, municipal entity, school district, public or private corporation, person, or firm to employ women in any occupation within the state for compensation less than that paid to men for equivalent service or for the same amount or class of work or labor in the same industry, school, establishment, office, or place of employment of any kind or description.

(2) If the state or any county, municipal entity, school district, public or private corporation, person, or firm violates any of the provisions of subsection (1), it is guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$25 or more than \$500 for each offense.

## Part 2 – Payment of Wages

**39-3-201. Definitions.** The following are the definitions used for the purpose of this part:

(1) "Commissioner of labor" refers to the director, commissioner, or chief

of the department of labor and industry, as the department is defined by law, or any person or persons designated by the director, commissioner, or chief for the purpose of this part.

(2) "Department" means the department of labor and industry as provided for in 2-15-1701.

(3) "Employ" means to permit or suffer to work.

(4) "Employee" includes any person who works for another for hire.

(5) "Employer" includes any individual, partnership, association, corporation, business trust, legal representative, or organized group of persons acting directly or indirectly in the interest of an employer in relation to an employee but does not include the United States.

(6) (a) "Wages" includes any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly, and includes bonus, piecework, and all tips and gratuities that are covered by section 3402(k) and service charges that are covered by section 3401 of the Internal Revenue Code of 1954, as amended and applicable on January 1, 1983, received by employees for services rendered by them to patrons of premises or businesses licensed to provide food, beverage, or lodging.

(b) For the purposes of this subsection (6), "service charge" means an arbitrary fixed charge added to the customer's bill by an employer in lieu of a tip. It is collected by the employer and must be distributed directly to the nonmanagement employee preparing or serving the food or beverage or to any other employee involved in related services, pursuant to a tip pool agreement.

**39-3-202. Rulemaking power of commissioner.** The commissioner is authorized to issue, amend, and enforce rules for the purpose of carrying out the provisions of this part.

**39-3-203. Employer to notify employee on written demand as to rate of wages and date of paydays.** (1) Each employer or an authorized representative of the employer shall, on written demand, prior to the commencing of work, notify each employee as to the rate of wages to be paid, whether by the hour, day, week, month, or year, and date of paydays. Such notification must be in writing to each employee or by posting of notice in a conspicuous place.

(2) The provisions of this section do not apply to an employer who has entered into a signed collective bargaining agreement, when such agreement contains conditions of employment, wages to be received, and hours to be worked, or to employers engaged in agriculture or stockraising; provided, however, such employers shall comply with the provisions of 39-3-205.

**39-3-204. Payment of wages generally.** (1) Except as provided in subsections (2) and (3), every employer of labor in the state of Montana shall pay to each employee the wages earned by the employee in lawful money of the United States or checks on banks convertible into cash on demand at the full face value of the checks, and a person for whom labor has been performed may

not withhold from any employee any wages earned or unpaid for a longer period than 10 business days after the wages are due and payable. However, reasonable deductions may be made for board, room, and other incidentals supplied by the employer, whenever the deductions are a part of the conditions of employment, or other deductions provided for by law.

(2) Wages may be paid to the employee by electronic funds transfer or similar means of direct deposit if the employee has consented in writing or electronically, if a record is retained, to be paid in this manner. However, an employee may not be required to use electronic funds transfer or similar means of direct deposit as a method for payment of wages.

(3) If an employee submits a timesheet after the employer's established deadline for processing employee timesheets for a particular time period and the employer does not pay the employee within the 10-day period provided for in subsection (1), the employer may pay the employee the wages due in the ensuing pay period. An employer may not withhold payment of the employee's wages beyond the next ensuing pay period. If there is not an established time period or time when wages are due and payable, the pay period is presumed to be semimonthly in length.

**39-3-205. Payment of wages when employee separated from employment prior to payday -- exceptions.** (1) When an employee separates from the employ of any employer, all the unpaid wages of the employee are due and payable on the next regular payday for the pay period during which the employee was separated from employment or 15 days from the date of separation from employment, whichever occurs first, either through the regular pay channels or by mail if requested by the employee.

(2) Except as provided in subsection (3), when an employee is separated for cause or laid off from employment by the employer, all the unpaid wages of the employee are due and payable immediately upon separation unless the employer has a written personnel policy governing the employment that extends the time for payment of final wages to the employee's next regular payday for the pay period or to within 15 days from the separation, whichever occurs first.

(3) When an employee is discharged by reason of an allegation of theft of property or funds connected to the employee's work, the employer may withhold from the employee's final paycheck an amount sufficient to cover the value of the theft if:

(a) the employee agrees in writing to the withholding; or

(b) the employer files a report of the theft with the local law enforcement agency within 7 days of the separation from employment, subject to the following conditions:

(i) if no charges are filed in a court of competent jurisdiction against the employee for the alleged theft within 15 days of the filing of the report with a local law enforcement agency, wages are due and payable upon the expiration of the 15-day period.

(ii) if charges are filed against the employee for theft, the court may order the



withheld wages to be offset by the value of the theft. If the employee is found not guilty or if the employer withholds an amount in excess of the value of the theft, the court may order the employer to pay the employee the withheld amount plus interest.

**39-3-206. Penalty for failure to pay wages at times specified in law.**

(1) An employer who fails to pay an employee as provided in this part or who violates any other provision of this part is guilty of a misdemeanor. A penalty must also be assessed against and paid by the employer to the employee in an amount not to exceed 110% of the wages due and unpaid.

(2) Nothing in this section may be construed to relieve an employer from the requirement to pay an employee the full amount of wages due if the employer is found in violation of this part.

**39-3-207. Period within which employee may recover wages and penalties.** (1) An employee may recover all wages and penalties provided for the violation of 39-3-206 by filing a complaint within 180 days of default or delay in the payment of wages.

(2) Except as provided in subsection (3), an employee may recover wages and penalties for a period of 2 years prior to the date on which the claim is filed if the employee is still employed by the employer or for a period of 2 years prior to the date of the employee's last date of employment.

(3) If an employer has engaged in repeated violations, an employee may recover wages and penalties for a period of 3 years from the date on which a claim is filed if the employee is still employed by the employer or for a period of 3 years prior to the date of the employee's last date of employment.

**39-3-208. Contracts in violation of part void.** Any contract or agreement made between an employer and an employee the provisions of which violate, evade, or circumvent this part is unlawful and void, but the employee may sue to recover the wages earned, together with the penalty specified in 39-3-206 or separately to recover the penalty if the wages have been paid.

**39-3-209. Commissioner of labor to investigate violations and institute actions for unpaid wages.** It shall be the duty of the commissioner of labor to inquire diligently for any violations of this part and to institute actions for the collection of unpaid wages and for the penalties provided for herein in such cases as he may deem proper and to enforce generally the provisions of this part.

**39-3-210. Investigative powers of commissioner.** (1) The commissioner or his authorized representatives are empowered to enter and inspect such places, question such employees, and investigate such facts, conditions, or matters which they may consider appropriate to determine whether any person has violated any provision of this part or any rule issued hereunder or which may aid in the enforcement of the provisions of this part.

(2) The commissioner or his authorized representatives may administer oaths and examine witnesses under oath; issue subpoenas; compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and testimony; and take depositions and affidavits in any proceeding before the commissioner.

**39-3-211. Commissioner to take wage assignments.** Whenever the commissioner determines that one or more employees have claims for unpaid wages, he shall, upon the written request of the employee, take an assignment of the claim in trust for such employee and may maintain any proceeding appropriate to enforce the claim, including liquidated damages pursuant to this part. With the written consent of the assignor, the commissioner may settle or adjust any claim assigned pursuant to this section.

**39-3-212. Court enforcement of administrative decision. (1)** A department default order or a decision of the hearings officer, if judicial review is not sought, may be enforced by application by the commissioner to a district court for an order or judgment enforcing the decision. The commissioner shall apply to the district court where the employer has its principal place of business or in the first judicial district of the state. A proceeding under this section is not a review of the validity of the administrative decision.

(2) If judicial review is sought, the district court may issue an order or a judgment enforcing the decision of the department or the hearings officer in a wage claim proceeding. In a case involving failure to pay the standard prevailing rate of wages provided for in Title 18, chapter 2, part 4, the district court may issue an order or a judgment enforcing the decision of the hearings officer.

**39-3-213. Disposition of wages. (1)** The commissioner of labor shall deposit wages collected under parts 2 and 4 of this chapter into the wage collection fund and shall attempt to make payment of wages to the entitled person. Wages deposited into the wage collection fund do not bear interest. The wage collection fund is an agency fund as provided in 17-2-102(3)(d). The payment of wages collected may be made by means of state warrants.

(2) A warrant issued pursuant to subsection (1) that remains unclaimed for more than 6 months from the date of issuance must be returned to the state treasurer to be stale-dated in accordance with 17-8-303.

**39-3-214. Court costs and attorneys' fees. (1)** Whenever it is necessary for the employee to enter or maintain a suit at law for the recovery or collection of wages due as provided for by this part, a resulting judgment must include a reasonable attorney's fee in favor of the successful party, to be taxed as part of the costs in the case.

(2) Any judgment for the plaintiff in a proceeding pursuant to this part must include all costs reasonably incurred in connection with the proceeding, including attorneys' fees.

(3) If the proceeding is maintained by the commissioner, no court costs or fees are required of him nor is he required to furnish any bond or other security that might otherwise be required in connection with any phase of the proceeding.

**39-3-215. Authority of county attorney.** Nothing herein contained shall be construed to limit the authority of the county attorney of any county of the state to prosecute actions, both civil and criminal, for such violations of this part as may come to his knowledge or to enforce the provisions hereof independently and without specific direction of the commissioner of labor.

**39-3-216. Mediation -- hearing.** (1) If the department determines that a wage claim is valid and the employer does not appeal the determination, the department may enter a default order against the employer for the amount of wages due and for any penalty assessed pursuant to 39-3-206. The department may enforce the default order pursuant to 39-3-212.

(2) If a party disputes the determination of the department prior to a contested case, the department shall conduct mediation of the dispute in accordance with guidelines to be established by department rule.

(3) When the department determines that a wage claim is valid, the department shall mail the determination to the parties at the last-known address of each party. If a party appeals the department's determination within 15 days after the determination is mailed by the department, a hearing must be conducted according to contested case procedures under Title 2, chapter 4, part 6, except that service need not be made as prescribed for civil actions in the district court and the hearings officer is not bound by statutory or common-law rules of evidence. The hearing may be conducted by telephone or by videoconference. The department shall by rule provide relief for a person who does not receive the determination by mail.

(4) The decision of the hearings officer is final unless an aggrieved party requests a rehearing or initiates judicial review, pursuant to Title 2, chapter 4, part 7, by filing a petition in district court within 30 days of the date of mailing of the hearings officer's decision.

### **Part 3 – Reciprocal Agreement for Collection of Wages Act**

**39-3-301. Short title.** This part may be cited as "The Reciprocal Agreement for Collection of Wages Act of 1977".

**39-3-302. Purpose.** The purpose of this part is to provide for a method of reciprocal enforcement in other states of Montana's wage payment laws contained in part 2 of this chapter and to provide for reciprocal enforcement in Montana of similar wage payment laws of other states.

**39-3-303. Reciprocal agreements for collection of wages.** The department of labor and industry may enter into reciprocal agreements with the labor department or corresponding agency of another state or with the person, board, officer, or commission authorized to act for and on behalf of the department or agency for the collection in the other state of claims or judgments for wages and other demands based upon claims previously assigned to the department of labor and industry.

**39-3-304. Actions in other states for collections of claims -- assignments for collection.** The department of labor and industry may, to the extent provided by a reciprocal agreement entered into pursuant to 39-3-303 or by the laws of another state, maintain actions in the courts of another state for the collection of claims for wages, judgments, and other demands and may assign the claims, judgments, and demands to the labor department or agency of another state for collection to the extent permitted or provided for by the laws of the other state or by reciprocal agreement.

**39-3-305. Claims assigned by other states -- actions -- collection.** The department of labor and industry may, upon the written request of the labor department or other corresponding agency of another state or a person, board, officer, or commission of the other state authorized to act for and on behalf of the labor department or corresponding agency, maintain actions in the courts of this state upon assigned claims for wages, judgments, and demands arising in the other state in the same manner and to the same extent that these actions by the department of labor and industry are authorized when arising in this state. However, these actions may be commenced and maintained only in those cases where the other state, by appropriate legislation or by reciprocal agreement, extends a like comity to similar cases arising in this state.

**39-3-306. Limitations.** Limitations regarding the amount of wages covered by a reciprocal agreement or the time during which the wages are accrued shall be the limitations imposed by the laws of the state originating the action.

## **Part 4 – Minimum Wage and Overtime Compensation**

**39-3-401. Declaration of policy.** It is declared to be the policy of this part to:

- (1) establish minimum wage and overtime compensation standards for workers at levels consistent with their health, efficiency, and general well-being;
- (2) safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency, and general well-being of workers against the unfair competition of wage and hour standards which do not provide such adequate standards of living; and
- (3) sustain purchasing power and increase employment opportunities.

**39-3-402. Definitions.** As used in this part, the following definitions apply:

(1) "Commissioner" means the commissioner of labor and industry.

(2) "Employ" means to suffer or permit to work.

(3) "Employee" means an individual employed by an employer.

(4) (a) "Farm or ranch" means an endeavor primarily engaged in cultivating the soil or in connection with raising or harvesting an agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, and poultry and fur-bearing animals and wildlife.

(b) As used in this subsection (4), "livestock" includes ostriches, rheas, and emus.

(5) "Farm worker" means a person employed to do a service performed on a farm or ranch.

(6) "Occupation" means an occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed.

(7) (a) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or check on banks convertible into cash on demand at full face value, subject to an allowance as may be permitted by regulations of the commissioner under 39-3-403. The term "wage" includes the reasonable cost to the employer of furnishing the employee with lodging or any other facility if the lodging or other facility is customarily furnished by the employer to employees. However, the inclusion may not exceed an amount equal to 40% of the total wage paid by the employer to the employee.

(b) The term "wage" does not include the cost to the employer of providing meals or a meal allowance to the employee or the value of tips or gratuities that are covered by section 3402(k) or service charges that are covered by section 3401 of the Internal Revenue Code of 1954, as amended and applicable on January 1, 1983, received by employees for services rendered by them to patrons of premises or businesses licensed to provide food, beverage, or lodging.

(c) For the purposes of this subsection (7), "service charge" means an arbitrary fixed charge added to the customer's bill by an employer in lieu of a tip. It is collected by the employer and must be distributed directly to the nonmanagement employee preparing or serving the food or beverage or to any other employee involved in related services, pursuant to a tip pool agreement.

**39-3-403. Rulemaking authority.** The commissioner shall adopt and revise administrative rules to carry out the purposes of this part.

**39-3-404. Minimum wage.** (1) Except as otherwise provided in this part and except for farm workers as provided in subsection (2), every employer shall pay to each of his employees a wage of not less than the applicable minimum wage as determined by the commissioner in accordance with 39-3-409.

(2) In the case of a farm worker employed for a part of a calendar year which includes periods requiring working hours in excess of 8 hours per day and

other seasonal periods requiring working hours substantially less than 8 hours per day, the employer may pay the worker at a fixed rate of compensation during the term of employment. The employer may elect to:

(a) keep a record of the total number of hours worked by the worker during the part of the year during which the worker was employed by him (the total wages paid by such employer to such employee for that part of the year during which said employee was employed by him shall not be less than the applicable minimum wage rate multiplied by the total number of hours so worked); or

(b) in lieu of the minimum wage set forth herein, pay the farm worker a wage as herein defined on a monthly basis. This monthly compensation shall constitute a minimum wage and shall not be less than \$635 a month beginning January 1, 1990.

**39-3-405. Overtime compensation.** (1) An employer may not employ any employee for a workweek longer than 40 hours unless the employee receives compensation for employment in excess of 40 hours in a workweek at a rate of not less than 1 1/2 times the hourly wage rate at which the employee is employed.

(2) An overtime provision does not apply for farm workers.

(3) Employers of students at an amusement or recreational area that operates on a seasonal basis who furnish the students with board, lodging, or other facilities may not employ the students for a workweek longer than 48 hours, unless the students receive compensation for their employment in excess of 48 hours in a workweek at a rate of not less than 1 1/2 times the hourly wage rate at which they are employed.

(4) The application of the overtime provisions of subsection (1) to the employment of firefighters and law enforcement officers by the state must be consistent with the Fair Labor Standards Act of 1938, as amended, and consistent with regulations promulgated under the act.

**39-3-406. Exclusions.** (1) The provisions of 39-3-404 and 39-3-405 do not apply with respect to:

(a) students participating in a distributive education program established under the auspices of an accredited educational agency;

(b) persons employed in private homes whose duties consist of menial chores, such as babysitting, mowing lawns, and cleaning sidewalks;

(c) persons employed directly by the head of a household to care for children dependent upon the head of the household;

(d) immediate members of the family of an employer or persons dependent upon an employer for half or more of their support in the customary sense of being a dependent;

(e) persons who are not regular employees of a nonprofit organization and who voluntarily offer their services to a nonprofit organization on a fully or partially reimbursed basis;

(f) persons with disabilities engaged in work that is incidental to training or evaluation programs or whose earning capacity is so severely impaired that they

are unable to engage in competitive employment;

**(g)** apprentices or learners, who may be exempted by the commissioner for a period not to exceed 30 days of their employment;

**(h)** learners under the age of 18 who are employed as farm workers, provided that the exclusion may not exceed 180 days from their initial date of employment and further provided that during this exclusion period, wages paid the learners may not be less than 50% of the minimum wage rate established in this part;

**(i)** retired or semiretired persons performing part-time incidental work as a condition of their residence on a farm or ranch;

**(j)** an individual employed in a bona fide executive, administrative, or professional capacity, as these terms are defined by regulations of the commissioner, or in an outside sales capacity, as defined in 29 CFR 541.5;

**(k)** an individual employed by the United States of America;

**(l)** resident managers employed in lodging establishments or assisted living facilities who, under the terms of their employment, live in the establishment or facility;

**(m)** a direct seller as defined in 26 U.S.C. 3508;

**(n)** a person placed as a participant in a public assistance program authorized by Title 53 into a work setting for the purpose of developing employment skills. The placement may be with either a public or private employer. The exclusion does not apply to an employment relationship formed in the work setting outside the scope of the employment skills activities authorized by Title 53.

**(o)** a person serving as a foster parent, licensed as a foster care provider in accordance with 52-2-621, and providing care without wage compensation to no more than six foster children in the provider's own residence. The person may receive reimbursement for providing room and board, obtaining training, respite care, leisure and recreational activities, and providing for other needs and activities arising in the provision of in-home foster care.

**(p)** an employee employed in domestic service employment to provide companionship services, as defined in 29 CFR 552.6, or respite care for individuals who, because of age or infirmity, are unable to care for themselves as provided under section 213(a)(15) of the Fair Labor Standards Act, 29 U.S.C. 213, when the person providing the service is employed directly by a family member or an individual who is a legal guardian.

**(2)** The provisions of 39-3-405 do not apply to:

**(a)** an employee with respect to whom the United States secretary of transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of 49 U.S.C. 31502;

**(b)** an employee of an employer subject to 49 U.S.C. 10501 and 49 U.S.C. 60501, the provisions of part I of the Interstate Commerce Act;

**(c)** an individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state;

**(d)** a salesperson, parts person, or mechanic paid on a commission or contract basis and primarily engaged in selling or servicing automobiles, trucks,

mobile homes, recreational vehicles, or farm implements if the salesperson, parts person, or mechanic is employed by a nonmanufacturing establishment primarily engaged in the business of selling the vehicles or implements to ultimate purchasers;

(e) a salesperson primarily engaged in selling trailers, boats, or aircraft if the salesperson is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers;

(f) a salesperson paid on a commission or contract basis who is primarily engaged in selling advertising for a radio or television station employer;

(g) an employee employed as a driver or driver's helper making local deliveries who is compensated for the employment on the basis of trip rates or other delivery payment plan if the commissioner finds that the plan has the general purpose and effect of reducing hours worked by the employees to or below the maximum workweek applicable to them under 39-3-405;

(h) an employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways that are not owned or operated for profit, that are not operated on a sharecrop basis, and that are used exclusively for supply and storing of water for agricultural purposes;

(i) an employee employed in agriculture by a farmer, notwithstanding other employment of the employee in connection with livestock auction operations in which the farmer is engaged as an adjunct to the raising of livestock, either alone or in conjunction with other farmers, if the employee is:

(i) primarily employed during a workweek in agriculture by a farmer; and

(ii) paid for employment in connection with the livestock auction operations at a wage rate not less than that prescribed by 39-3-404;

(j) an employee of an establishment commonly recognized as a country elevator, including an establishment that sells products and services used in the operation of a farm if no more than five employees are employed by the establishment;

(k) a driver employed by an employer engaged in the business of operating taxicabs;

(l) an employee who is employed with the employee's spouse by a nonprofit educational institution to serve as the parents of children who are orphans or one of whose natural parents is deceased or who are enrolled in the institution and reside in residential facilities of the institution so long as the children are in residence at the institution and so long as the employee and the employee's spouse reside in the facilities and receive, without cost, board and lodging from the institution and are together compensated, on a cash basis, at an annual rate of not less than \$10,000;

(m) an employee employed in planting or tending trees; cruising, surveying, or felling timber; or transporting logs or other forestry products to a mill, processing plant, railroad, or other transportation terminal if the number of employees employed by the employer in the forestry or lumbering operations does not exceed eight;

(n) an employee of a sheriff's office who is working under an established



work period in lieu of a workweek pursuant to 7-4-2509(1);

(o) an employee of a municipal or county government who is working under a work period not exceeding 40 hours in a 7-day period established through a collective bargaining agreement when a collective bargaining unit represents the employee or by mutual agreement of the employer and employee when a bargaining unit is not recognized. Employment in excess of 40 hours in a 7-day, 40-hour work period must be compensated at a rate of not less than 1 1/2 times the hourly wage rate for the employee.

(p) an employee of a hospital or other establishment primarily engaged in the care of the sick, disabled, aged, or mentally ill or defective who is working under a work period not exceeding 80 hours in a 14-day period established through either a collective bargaining agreement when a collective bargaining unit represents the employee or by mutual agreement of the employer and employee when a bargaining unit is not recognized. Employment in excess of 8 hours a day or 80 hours in a 14-day period must be compensated for at a rate of not less than 1 1/2 times the hourly wage rate for the employee.

(q) a firefighter who is working under a work period established in a collective bargaining agreement entered into between a public employer and a firefighters' organization or its exclusive representative;

(r) an officer or other employee of a police department in a city of the first or second class who is working under a work period established by the chief of police under 7-32-4118;

(s) an employee of a department of public safety working under a work period established pursuant to 7-32-115;

(t) an employee of a retail establishment if the employee's regular rate of pay exceeds 1 1/2 times the minimum hourly rate applicable under section 206 of the Fair Labor Standards Act of 1938, 29 U.S.C. 206, and if more than half of the employee's compensation for a period of not less than 1 month is derived from commissions on goods and services;

(u) a person employed as a guide, cook, camp tender, or livestock handler by a licensed outfitter as defined in 37-47-101;

(v) an employee employed as a radio announcer, news editor, or chief engineer by an employer in a second- or third-class city or a town;

(w) an employee of the consolidated legislative branch as provided in 5-2-503;

(x) an employee of the state or its political subdivisions employed, at the employee's option, on an occasional or sporadic basis in a capacity other than the employee's regular occupation. Only the hours that the employee was employed in a capacity other than the employee's regular occupation may be excluded from the calculation of hours to determine overtime compensation.

**39-3-407. Enforcement.** Enforcement of this part shall be treated as a wage claim action and shall be pursued in accordance with part 2 of this chapter, as amended. This part may also be enforced in accordance with part 5 of this chapter for the benefit of certain employees in the mineral and oil industry. The

commissioner may enforce this part without the necessity of a wage assignment.

**39-3-408. Provisions cumulative. (1)** The provisions of this part are in addition to other provisions provided by law for the payment and collection of wages and salaries and are applicable to employees of the state of Montana, except that the penalty provisions of 39-3-206 do not apply to minimum wage and overtime claims that are subject to the Fair Labor Standards Act of 1938, in which case liquidated damages as determined under the Fair Labor Standards Act of 1938 apply.

**(2)** Sections 39-3-402 and 39-3-404 apply to an employee covered by the Fair Labor Standards Act of 1938 if state law provides a minimum wage that is higher than the minimum wage established under federal law.

**39-3-409. Adoption of minimum wage rates -- exception. (1)** The minimum wage, except as provided in subsection (3), must be the the greater of either:

**(a)** the minimum hourly wage rate as provided under the federal Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)), excluding the value of tips received by the employee and the special provisions for a training wage; or

**(b)** \$6.15 an hour, excluding the value of tips received by the employee and the special provisions for a training wage.

**(2)** **(a)** The minimum wage is subject to a cost-of-living adjustment, as provided in subsection (2)(b).

**(b)** No later than September 30 of each year, an adjustment of the wage amount specified in subsection (1) must be made based upon the increase, if any, from August of the preceding year to August of the year in which the calculation is made in the consumer price index, U.S. city average, all urban consumers, for all items, as published by the bureau of labor statistics of the United States department of labor.

**(c)** The wage amount established under this subsection (2):

**(i)** must be rounded to the nearest 5 cents; and

**(ii)** becomes effective as the new minimum wage, replacing the dollar figure specified in subsection (1), on January 1 of the following year.

**(3)** The minimum wage rate for a business whose annual gross sales are \$110,000 or less is \$4 an hour.

## **Part 5 – Wage Protection for Certain Employees of Mineral and Oil Industry**

**39-3-501. Certain laws extended to certain employers in mineral and oil industry.** For the purposes of this part, all the provisions of part 2 of this chapter extend to and govern every person, firm, partnership, or corporation engaged in the business of extracting or of extracting and refining or reducing metals and minerals or mining for coal or drilling for oil, except persons, firms,

partnerships, or corporations that have a free and unencumbered title to not less than one-half the fee of the property being worked. For this purpose, an outstanding unpaid or unredeemed tax lien sale certificate is not considered an encumbrance.

**39-3-502. Operator to file statement -- penalty for failure to file.**

(1) Every person, firm, or partnership coming within the provisions of this part shall, before commencing operations, file with the commissioner of labor and industry and also in the office of the county clerk and recorder of each county where such operations are to be carried on a verified statement showing the names and addresses of each party interested therein or, if a corporation, the names and addresses of its officers and directors, the principal place of business of such corporation, and the names and addresses of the person or persons resident of Montana designated as the person or persons upon whom service of process may be made.

(2) Every person, firm, partnership, or corporation failing to file a statement with the commissioner of labor and industry and in the offices of the county clerk and recorders, as provided in subsection (1), shall be deemed guilty of a misdemeanor and punishable as provided by law.

**39-3-503. Report of violations to county attorney by commissioner.**

Whenever it shall appear from reliable information satisfactory to the commissioner of labor and industry that any person, firm, partnership, or corporation engaged in the business mentioned in 39-3-501 and not exempt from the effect of this part shall have failed to pay any wages or salaries due his employees as required by part 2 of this chapter, he shall have the right to deliver such information to the county attorney of the county wherein the operations of the employer are being carried on and to request such county attorney to file a complaint in the district court of said county in accordance with the provisions of this part and part 2 of this chapter.

**39-3-504. Report of violations directly to county attorney by employee.** Any employee may make complaint directly to the county attorney relative to any violation of this part or part 2 of this chapter.

**39-3-505. County attorney to notify commissioner of violation reported directly by employee.** The county attorney of the county shall promptly notify the commissioner of labor and industry of any complaint made by any employee relative to the violation of any of the provisions of this part or part 2 of this chapter and shall in writing keep the commissioner advised of each step in any proceeding taken by the county attorney thereunder.

**39-3-506. County attorney to file complaint in district court on belief of violation.** If a county attorney believes after receiving information that the provisions of this part or part 2 of this chapter have been violated and that

such violation was willful or that the financial condition of the employer is such as to endanger employees in receiving prompt payment or collection of wages, he shall file a complaint in district court. All proceedings upon such complaint must be promptly prosecuted.

**39-3-507. Prayer for relief.** Should such complaint be filed by the county attorney upon his own motion or at said request of said commissioner of labor and industry, the same shall pray that relief be had against the employer for the greater security for the payment of salaries and wages of the employees.

**39-3-508. Summons -- service of process. (1)** Upon the filing of such complaint, summons shall issue thereon and a copy of such complaint and a copy of the summons shall be served upon the employer, who shall have 10 days after such service to appear and defend such action.

**(2)** All orders and other process provided for in this part shall be served by the sheriff upon the employer in the same manner as a summons in a civil suit is served. Service upon any partner or member of any firm shall be considered service upon each partner and each member of the firm. In the event that the employer is a nonresident or a corporation without officers or directors within the county who cannot conveniently and promptly be found for service, then service upon the manager, superintendent, or foreman in charge of the work or, there being none such, then posting a copy of the order or other process provided to be served herein in a conspicuous place at or near the entrance to the principal workings shall be deemed sufficient service.

**39-3-509. Hearing on complaint -- court order to pay wages due or appear and show cause why bond should not be required.** Upon the conclusion of the hearing upon such complaint, the judge of the district court may make findings and shall issue an order to the employer in default to pay within 5 days all wages and salaries found by the court to be due and unpaid or an order to appear before the court within 10 days and show cause why a judgment and order should not issue requiring said employer to give bond for the payment of all wages and salaries then due and thereafter to accrue to his employees within said county. Service of such order shall be made at least 5 days before the date set for hearing or the date to which such hearing may be continued by the court upon good cause shown.

**39-3-510. Show cause hearing -- restraining order until bond furnished.** Upon the hearing of such order, if the court shall determine that the default of said employer in the payment of wages and salaries was willful or that the financial condition of the employer is such as to endanger or delay or impede employees in collecting their wages and salaries or that the employer is a nonresident of the state without visible property in said county subject to execution or who has within 2 years defaulted in payroll payments, the court may adjudge and decree that the employee or employees are endangered in the collection

of their just demands and the court may issue a restraining order against the employer forbidding further prosecution of operations by said employer until after the employer has furnished a good and sufficient bond, in form to be approved by the court with good and sufficient surety or sureties who can and do legally justify, and deposit said bond with the clerk of court of said county obligating the employer to pay all wages and salaries as required by part 2 of this chapter.

**39-3-511. Bond requirements. (1)** Said bond may be that of a surety company licensed and authorized to do business within the state or of two owners of real estate situate in said county and who can and do justify as sureties in the same manner as sureties justify on appeal bonds or bail bonds.

**(2)** Said bond shall be in the sum of not less than \$500 for each unit of five men or less employed by such person, firm, partnership, or corporation.

**(3)** Said bond shall continue in force for 1 year.

**(4)** Said bond shall run in the name of the state of Montana and shall be examined and approved by the judge of the district court, said approval to be endorsed thereon.

**39-3-512. Enjoining further operations in event bond not filed.**

**(1)** In the event that the bond ordered by the district court is not executed and filed with the county treasurer within the time fixed by the court, the court may, if it deems the persons working for such employer to be insecure in the prompt payment or collection of their wages or salaries, enjoin any and all further operations of said employer within the state for a period of 1 year at any mine or reduction works or oil well or until the order, judgment, or decree of the court shall have been fully complied with.

**(2)** The county attorney of the county wherein such proceedings are had or the attorney general of the state shall, at his or their discretion, file such action and prosecute the same.

**39-3-513. Costs of proceeding.** The said district court shall include in any order, judgment, or decree against the employer all costs of the proceeding, which shall be taxed against the employer and paid into the clerk of the court to be by him deposited with the county treasurer to the credit of the general fund of the county.

**39-3-514. Punishment of employer for contempt.** In event the employer fails for 30 days or more to pay the costs of the proceeding and/or fails to furnish the bond required by the court, the court may proceed against and punish said employer for contempt of court.

**39-3-515. Publication of notice of court order.** In the discretion of the court, it may order the clerk of the court to publish a brief notice or memorandum in a newspaper published in the county of the entry of the order against the employer requiring said employer to furnish said bond. Said publication shall be for

4 consecutive weeks. The cost of such publication shall be assessed against the employer as one of the costs of the proceeding.

**39-3-516. Review of court order by supreme court.** In event any employer against whom an order to furnish the bond described in this part feels aggrieved by any order or injunction of the district court, he shall be entitled, upon payment for the transcript of record, to have his objections and exceptions reviewed and determined by the supreme court as upon a writ of certiorari.

**39-3-517. Suit on bond.** Any person whose wages or salary has remained unpaid for 15 days or more after due shall have a right to sue upon said bond for the recovery of his wages or salary.

**39-3-518. Attorney's fee for suit on bond.** In event any person whose wages or salary has remained unpaid for 15 days or more after due shall bring suit as in 39-3-517 provided, the court shall assess as costs against the unsuccessful party a reasonable attorney's fee.

**39-3-519. Clarification as to construction and applicability of part.**

(1) Nothing contained in this part shall be considered as requiring any person, firm, partnership, or corporation to file a bond or bonds if he or it pays for all labor in full each day or where such labor has been performed upon a written building or construction contract to furnish material or other consideration as well as labor.

(2) Nothing herein shall prohibit the making or entering into of any wage or working agreement such as grubstake agreements and/or similar agreements, provided such employer or contractor keeps in force proper workers' compensation insurance.

**39-3-520. Remedy cumulative.** The remedy herein provided for the greater security for the payment of wages and salaries and the collection thereof shall be in addition to any remedy now provided by law for the payment and collection of wages and salaries.

## CHAPTER 4

## HOURS OF LABOR IN CERTAIN EMPLOYMENTS

**Part 1 – Hours of Labor – Penalties and Liability for Violations Thereof**

**39-4-101. Hoisting engineers. (1)** It shall be unlawful for any person or persons, company, or corporation to operate or handle or to induce, persuade, or prevail upon any person or persons to operate or handle for more than 8 hours in 24 hours of each day any hoisting engine at or in any mine.

**(2)** This section shall apply only to such plants as are in continuous operation or are operated 16 or more hours in 24 hours of each day or at or in any mine where said hoisting engine develops 15 or more horsepower or at or in any mine wherein there are 15 or more men employed underground in 24 hours of each day. However, the provisions of this section shall not apply to any person or persons operating any hoisting engine more than 8 hours in each 24 hours for the purpose of relieving another employee in case of sickness or other unforeseen cause or causes.

**(3)** Any person or persons, company, or corporation who shall violate any of the provisions of this section shall upon conviction be punished by a fine of not less than \$10 or more than \$100. Each and every day that such person or persons, company, or corporation may continue to violate any of the provisions of this section shall be considered a separate and distinct offense and shall be punishable as such.

**39-4-102. Drivers and attendants of motor buses. (1)** Drivers or attendants of motor buses employed in the state may not be employed for more than 8 hours in any 24-hour period. Drivers or attendants of motor buses must be allowed a rest of at least 12 hours between the completion of their services in any 24-hour period and the beginning of their services in the succeeding 24-hour period. In computing the number of hours of employment made by the provisions of this section, evidence may be introduced showing that part of such time is consumed prior to entry within the state.

**(2)** The provisions of this section do not apply to drivers or attendants employed by a city, town, county, or political subdivision thereof.

**(3)** The provisions of this section do not apply when life is in danger or property is in imminent danger of destruction; or in case of delay due to accident or impassable roads, abnormal road conditions, or snow blockades; or when mails for the drivers or attendants are delayed.

**(4)** "Attendant", for the purpose of this section, is defined as any employee engaged for a portion of a day driving or repairing a motor bus and who is required to remain on the vehicle as a relief driver or mechanic for time in excess of the 8-hour period for which he is rightly employed.

(5) Any employer or supervisor in charge of employees who requires a driver or attendant as above defined to labor contrary to the provisions of this section is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than \$100 or more than \$600 or by imprisonment of not less than 30 days or more than 7 months or both such fine and imprisonment.

(6) All motor bus companies operating lines in this state are liable in damage for all injuries to the person resulting from the violation of the provisions of this section.

**39-4-103. Underground miners and smeltermen.** (1) The period of employment of workers in all underground mines or workings, including railroad or other tunnels, is 8 hours per day, except in cases of emergency when life and property are in imminent danger.

(2) The period of employment of workers in smelters, stamp mills, sampling works, concentrators, and all other institutions for the reduction of ores and refining of ores or metals is 8 hours per day, except in cases of emergency where life or property is in imminent danger.

(3) Any person, corporation, agent, manager, or employer who violates any of the provisions of this section is guilty of a misdemeanor and upon conviction thereof for each offense is subject to a fine of not less than \$100 or more than \$600 or by imprisonment in the county jail for a period of not less than 1 month or more than 7 months or by both such fine and imprisonment.

**39-4-104. Strip mining.** (1) For the purpose of this section, "strip mining" is defined as the removal of the overburden and coal or other materials from the ground and all of the operations pertaining thereto, without the necessity of providing timbers for the holding of said ground in place.

(2) A period of not more than 8 hours will constitute a day's labor of all employees working in strip mining, except in cases of emergencies for the protection of life or property when same is in danger.

(3) Any person, company, corporation, or lessee of the same who shall violate the provisions of this section shall upon conviction be punished by a fine of not less than \$50 or more than \$600 or by imprisonment of not less than 30 days or more than 7 months or both such fine and imprisonment. Each and every day that such person, company, corporation, or lessee may continue to violate the provisions of this section shall be considered a separate and distinct offense and shall be punished as such.

**39-4-105. Retail stores.** (1) A period of 8 hours shall constitute a day's work and a period of not to exceed 48 hours shall constitute a week's work in all cities and towns having a population of 2,500 or over for all persons employed in retail stores and in all leased businesses where the lessor dictates the price, kind of merchandise that is sold, and the hours and conditions of operation of the business; all persons employed in delivering goods sold in such stores; all persons employed in wholesale warehouses used for supplying retail establishments with



goods; and all persons employed in delivering goods to retail establishments from such wholesale warehouses.

(2) The provisions of this section shall not apply to registered pharmacists or assistant pharmacists.

(3) Any person, corporation, agent, manager, or employer who shall violate any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$50 or more than \$600 or by imprisonment in the county jail for not less than 30 days or more than 7 months or by both such fine and imprisonment.

**39-4-106. Telephone operators.** (1) On all lines of public telephones operated in whole or in part within this state, it shall hereafter be unlawful for any owner, lessee, company, or corporation to hire or employ any operator or operators, other person or persons to run or operate a telephone board or boards for more than 9 hours in 24 hours in cities or towns having a population of 3,000 inhabitants or over.

(2) The provisions of this section shall not apply to any person or persons, operator or operators operating any telephone board or boards more than 9 hours in each 24 for the purpose of relieving another employee in case of sickness or other unforeseen cause or causes.

(3) Any owner, lessee, company, or corporation who shall violate any of the provisions of this section shall upon conviction be punished by a fine of not less than \$100 or more than \$500. Each and every day that such owner, lessee, company, or corporation may continue to violate any of the provisions of this section shall be considered a separate and distinct offense and shall be punished as such.

**39-4-107. State and municipal governments, school districts, mines, mills, and smelters.** (1) A period of 8 hours constitutes a day's work in all works and undertakings carried on or aided by any municipal or county government, the state government, or a first-class school district, and on all contracts let by them, and for all janitors (except in courthouses of sixth- and seventh-class counties), engineers, firefighters, caretakers, custodians, and laborers employed in or about any buildings, works, or grounds used or occupied for any purpose by such municipal, county, or state government or first-class school district. A period of 8 hours constitutes a day's work in mills and smelters for the treatment of ores, in underground mines, and in the washing, reducing, and treatment of coal. This subsection does not apply in the event of an emergency when life or property is in imminent danger or to the situations specified in subsections (3) and (4).

(2) The provisions of subsection (1) do not apply to firefighters who are working a work period established in a collective bargaining agreement entered into between a public employer and a firefighters' organization or its exclusive representative.

(3) In counties where regular road and bridge departments are maintained, the county commissioners may, with the approval of the employees or their

duly constituted representative, establish a 40-hour workweek consisting of 4 consecutive 10-hour days. No employee may be required to work in excess of 8 hours in any one workday if he prefers not to.

(4) In municipal and county governments, the employer and employee may agree to a workday of more than 8 hours and to a 7-day, 40-hour work period:

(a) through a collective bargaining agreement when a collective bargaining unit represents the employee; or

(b) by the mutual agreement of the employer and employee when no bargaining unit is recognized.

**39-4-109. Cement plants and quarries. (1)** A period of 8 hours shall constitute a day's work, except in cases of emergency where life and property are in imminent danger, for all persons employed in or about cement plants and at quarries.

(2) Any person, corporation, agent, manager, or employer who shall violate any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$50 or more than \$600 or by imprisonment in the county jail for not less than 30 days or more than 7 months or by both such fine and imprisonment.

**39-4-110. Sugar refineries. (1)** A period of not to exceed 8 hours constitutes a day's work for all persons employed in or about sugar refineries, except in a case of emergency when life or property is in danger.

(2) The provisions of this section do not apply to beet receiving station employees or superintendents, master mechanics, or beet-end, sugar-end, and Steffan house foremen.

(3) Any person, corporation, agent, manager, or employer who violates the provisions of this section is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not less than \$50 or more than \$600 or by imprisonment in the county jail for not less than 30 days or more than 7 months or by both such fine and imprisonment.

**39-4-111. Restaurants. (1)** A period of not more than 8 hours shall constitute a day's work, and a period of not to exceed 48 hours shall constitute a week's work for persons employed in or about restaurants, cafes, lunch counters, and other commercial eating establishments. The hours of work must be so arranged that persons employed in or about restaurants, cafes, lunch counters, and other commercial eating establishments shall not be on duty more than 8 hours in the aggregate of any 12 consecutive hours. Such persons shall have at least 12 consecutive hours off duty.

(2) The provisions of this section shall not apply to any person or persons working more than 8 hours during any 12 consecutive hours or more than 48 hours during any week for the purpose of relieving another employee in case of sickness or where the health of the public is imperiled, where life and property are in imminent danger, or for other unforeseen cause or causes.

(3) Any person, corporation, manager, agent, or employer who shall violate any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$25 or more than \$50 or by imprisonment in the county jail for not less than 15 days or more than 60 days or by both such fine and imprisonment.

**39-4-112. Persons employed about public amusements.** (1) A period of not to exceed 8 hours shall constitute a day's work and a period of not to exceed 48 hours shall constitute a week's work for persons employed or working in or participating in and about any carnival, circus, derby show, walkathon, marathon dance, marathon race, marathon walk, or other endurance contest by whatever name it may be called within the state. The hours of work must be so arranged that persons employed in or participating or contesting in such an exhibition, show, or contest shall not be on duty more than 8 hours in the aggregate of any 12 consecutive hours. Such persons shall have at least 12 consecutive hours off duty.

(2) The provisions of this section shall not apply to any traveling circus or carnival which does not remain in any one county of the state for a period of more than 3 days and shall not apply to any person or persons working more than 8 hours in each 12 hours for the purpose of relieving another employee in case of sickness or where a breakdown in machinery occurs or where life or property is in imminent danger.

(3) Any person, corporation, agent, manager, employer, employee, contestant, or participant who shall violate the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished for the first offense by a fine of not less than \$50. For a second offense, he shall be punished by a fine of not less than \$100 or more than \$500 or by imprisonment in the county jail for not less than 90 days or more than 6 months or by both such fine and imprisonment. For a third or subsequent offense, he shall be punished by a fine of \$500 and imprisonment in the county jail for a term of 6 months. Each day's violation of this section shall constitute a separate offense within the meaning of this section.

## CHAPTER 9

## CONTRACTOR REGISTRATION

*Questions pertaining to this chapter, please call the  
Contractor Registration Unit at 444-7734*

**Part 1 – General Provisions**

**39-9-101. Purpose.** It is the purpose of this chapter to ensure that all construction contractors are competing fairly and in compliance with state laws.

**39-9-102. Definitions.** As used in this chapter, the following definitions apply:

(1) “Construction contractor” means a person, firm, or corporation that:

(a) in the pursuit of an independent business, offers to undertake, undertakes, or submits a bid to construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish for another a building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works, or the installation or repair of roofing or siding; or

(b) in order to do work similar to that described in subsection (1)(a) upon the construction contractor’s property, employs members of more than one trade on a single job or under a single building permit, except as otherwise provided.

(2) “Department” means the department of labor and industry.

**39-9-103. Rulemaking authority.** The department may adopt rules to implement this chapter.

**Part 2 -- Registration**

**39-9-201. Registration required -- application.** (1) Each construction contractor shall register with the department.

(2) An applicant for registration as a construction contractor shall submit an application on a form to be provided by the department that must include the following information:

(a) the applicant’s social security number;

(b) proof of compliance with workers’ compensation laws;

(c) the I.R.S. employer identification number, if any; and

(d) the name and address of:

(i) each partner if the applicant is a firm or partnership;

(ii) the owner if the applicant is an individual proprietorship;

(iii) the corporate officers and registered agent if the applicant is a corporation; or

(iv) the manager of a manager-managed limited liability company or the members of a member-managed limited liability company and the registered agent if the applicant is a limited liability company.

**39-9-204. Certificate of registration -- issuance -- duration . (1)** The department shall issue to the applicant a certificate of registration upon compliance with the registration requirements of this chapter.

(2) The department shall place the expiration date on the certificate. The certificate is valid for 2 years.

**39-9-205. When partnership or joint venture considered registered.**

A partnership or joint venture is considered registered under this chapter if one of the general partners or venturers whose name under which the partnership or venture does business is registered.

**39-9-206. Fees -- education program. (1)** The department shall charge fees for:

- (a) issuance, renewal, and reinstatement of certificates of registration; and
- (b) change of name, address, or business structure.

(2) The department shall set the fees by administrative rule. The fees must cover the full cost of issuing certificates, filing papers and notices, and administering and enforcing this chapter. The costs include reproduction, travel, per diem, and administrative and legal support costs.

(3) The fees charged in subsection (1)(a) may not exceed:

- (a) \$70 for the initial registration certificate; or
- (b) \$70 for the renewal or reinstatement of a registration certificate.

(4) The fees collected under this section must be deposited in the state special revenue fund in an account to the credit of the department for the administration and enforcement of this chapter and independent contractor certification provided for in Title 39, chapter 71, part 4.

(5) The department shall establish, cooperatively with representatives of the building industry, an industry and consumer information program, funded with 15% of the fees, to educate the building industry about the registration program and to educate the public regarding the hiring of building construction contractors.

(6) The fee for a joint application for a certificate of registration and an independent contractor exemption certificate may not exceed the total fee charged for a certificate of registration and an independent contractor exemption certificate that are obtained separately. The fee paid for the independent contractor exemption certificate may be used by the department to offset the cost of administering independent contractor certification provided for in Title 39, chapter 71, part 4.

**39-9-207. Contractor registration -- limiting liability.** A person who, pursuant to an oral or written contract, engages a construction contractor who is registered under this chapter on the date of the contract is not liable as an employer for workers' compensation coverage under 39-71-405, for unemployment insurance coverage, or for wages and fringe benefits for:

- (1) the registered construction contractor;
- (2) the employees of the registered construction contractor; or
- (3) any subsequent subcontractor or the employees of any subsequent subcontractor engaged to fulfill a part of or all of the obligations of the oral or written contract of the registered construction contractor listed in subsection (1).

**39-9-208 through 39-9-210 reserved.**

**39-9-211. Exemptions.** This chapter does not apply:

(1) to an authorized representative of the United States government, the state of Montana, or any incorporated municipality, county, alternative form of local government, irrigation district, reclamation district, or other municipal or political corporation or subdivision of this state;

(2) to an officer of a court acting within the scope of office;

(3) to a public utility operating under the regulations of the public service commission or to a rural cooperative utility operating under Title 35, chapter 18, in construction, maintenance, or development work incidental to its own business;

(4) to the repair or operation incidental to the discovery or production of oil or gas or incidental to the drilling, testing, abandoning, or other operation of an oil or gas well or a surface or underground mine or mineral deposit;

(5) to the sale or installation of finished products, materials, or articles of merchandise that are not actually fabricated into and do not become a permanent fixed part of a structure;

(6) to the construction, alteration, improvement, or repair carried on within the limits and boundaries of a site or reservation under the exclusive legal jurisdiction of the federal government;

(7) to a person who only furnished materials, supplies, or equipment without fabricating them into or consuming them in the performance of the work of the construction contractor;

(8) to work or operation on one undertaking or project considered of a casual, minor, or inconsequential nature, by one or more contracts, the aggregate contract price of which, for labor and materials and all other items, is less than \$2,500 a job. The exemption prescribed in this subsection does not apply when the work or construction is only a part of a larger or major operation, whether undertaken by the same or a different construction contractor, or in which a division of the operation is made into contracts of amounts of less than \$2,500 a job for the purpose of evasion of this chapter or otherwise.

(9) to a farmer or rancher while engaged in a farming, dairying, agriculture, viticulture, horticulture, or stock or poultry operation;

(10) to an irrigation district or reclamation district;

(11) to an operation related to clearing or other work upon land in rural districts for fire prevention purposes;

(12) to an owner who contracts for work to be performed by a registered construction contractor, but this exemption does not apply to an owner who is otherwise covered by this chapter who constructs a residence on the owner's property with the intention and for the purpose of promptly selling the improved property;

(13) to an owner working on the owner's property, whether occupied by the owner or not, but this exemption does not apply to an owner who is otherwise covered by this chapter who constructs an improvement on the owner's property with the intention and for the purpose of promptly selling the improved property, unless the owner has continuously occupied the property as the owner's primary residence for at least the last 12 months;

(14) to owners of commercial properties who use their own employees to do maintenance, repair, and alteration work in or upon their own properties;

(15) to an architect, civil or professional engineer, or professional land surveyor, licensed in Montana and acting solely in a professional capacity;

(16) to an electrician or plumber, licensed in Montana, operating within the scope of the license;

(17) to a contract security company, licensed under Title 37, chapter 60, operating within the scope of the license;

(18) to a person who engages in the activities regulated as an employee of a registered construction contractor with wages as the sole compensation or as an employee with wages as the sole compensation;

(19) to a person or entity licensed under Title 50, chapter 39, to sell, install, or service fire suppression or fire protection equipment;

(20) to a water well contractor licensed under Title 37, chapter 43, performing the work of a water well contractor;

(21) to an enrolled tribal member or an association, business, corporation, or other entity, at least 51% of which is owned by an enrolled tribal member or members and whose business is conducted solely within the exterior boundaries of an Indian reservation;

(22) to a contractor engaged in the logging industry who builds forest access roads for the purpose of harvesting and transporting logs from forest to mill;

(23) to a person working on the person's own residence, if the residence is owned by a person other than the resident; or

(24) to an independent contractor who has no employees. However, an independent contractor may voluntarily elect to register under this chapter.

### Part 3 – Business Practices

**39-9-301. Business practices -- penalty. (1)** Except as provided in 39-9-205, a person who has registered under one name as provided in this chapter may not engage in the business or act in the capacity of a construction contractor under any other name unless that name also is registered under this chapter.

**(2)** A construction contractor may not falsify a registration number and use it in connection with a solicitation or identification as a construction contractor. An individual construction contractor, partner, associate, agent, salesperson, solicitor, officer, or employee of a construction contractor shall use a true name and address at all times while engaged in the business or capacity of a construction contractor or in activities related to a construction contractor.

**(3) (a)** The finding of a violation of this section by the department at a hearing held in accordance with the Montana Administrative Procedure Act subjects the person who commits the violation to a penalty of not more than \$5,000, as determined by the department. The required hearing may be held by telephone or by videoconference. A penalty collected under this section must be deposited in the state special revenue account to the credit of the department for administration and enforcement of this chapter.

**(b)** Penalties under this section do not apply to a violation that is determined to be an inadvertent error.

**39-9-303. Department to compile and update list of registered construction contractors -- availability -- fee. (1)** The department shall compile a list of all construction contractors registered under this chapter and update the list at least bimonthly. The list is public information and must be available to the public upon request for a reasonable fee.

**(2)** The department shall inform a person, firm, or corporation whether a construction contractor is registered. The department shall provide the information without charge, except for a reasonable fee for any copies made.

**39-9-304. Provisions exclusive -- certain local authority not limited or abridged.** The provisions of this chapter relating to the registration or licensing of a person, firm, or corporation, including the requirement of a bond with the state of Montana named as obligee and the collection of a fee, are exclusive. A political subdivision of the state may not require or issue any registrations, licenses, or bonds for the same or a similar purpose. However, this section does not limit or abridge the authority of a local government to levy and collect a general and nondiscriminatory license fee levied upon all businesses. This section does not limit the authority of a local government with respect to contractors not required to be registered under this chapter.



#### Part 4 – Infractions – Penalties

**39-9-401. Violation -- infraction -- penalty -- disposition. (1)** It is a violation of this chapter and an infraction for any construction contractor to:

(a) perform work as a construction contractor without being registered as required by this chapter;

(b) perform work as a construction contractor when the construction contractor's registration is suspended; or

(c) transfer a valid registration to an unregistered construction contractor or allow an unregistered construction contractor to work under a registration issued to another construction contractor.

(2) (a) A determination by the department of a violation of this section subjects the person who commits the violation to a penalty of up to \$500, as determined by the department. A person who has been determined to have violated this section may request that a hearing be held in accordance with the Montana Administrative Procedure Act. The hearing may be held by telephone or videoconference. An appeal of the hearing decision must be made in the same manner as prescribed in 39-51-2403.

(b) A penalty under this section does not apply to a violation that is determined to be an inadvertent error.

(c) A penalty collected under this section must be deposited in the uninsured employers' fund established in 39-71-503.

CHAPTER 33

GENERAL LIMITATIONS ON  
COLLECTIVE BARGAINING RIGHTS

**Part 1 – Right to Work Without Union Interference  
in Certain Small Businesses**

**39-33-101. Intent of part.** It is the intent of this part that a sole proprietor or a member of a partnership consisting of not more than two partners who own a retail or amusement establishment and the members of his immediate family shall have the right to do any work in his place of business without interference by any union or any member thereof.

**39-33-102. Immediate family defined.** “Immediate family” shall include the owner, his spouse, and any children under the age of 18 years.

**39-33-103. Unfair labor practice.** Any union or member thereof who shall infringe or interfere with the right of an owner and the members of his immediate family to do any work in his place of business shall be guilty of an unfair labor practice.

**39-33-104. Beer and liquor establishment excepted.** Nothing in this part shall apply to an establishment that sells liquor or beer.

**39-33-105. Violation.** Violation of any of the provisions of this part shall be punishable by a fine of \$50.

**Part 2 – Employment of Strikebreakers**

**39-33-201. Recruitment of strikebreakers by third parties.** No person, partnership, firm, or officer or agent thereof may recruit, procure, supply, or refer a professional strikebreaker for employment in place of an employee involved in a labor dispute when such person, partnership, or firm is not a party to the dispute.

**39-33-202. Professional strikebreakers prohibited. (1)** An employer involved in a labor dispute may not employ in the place of an employee involved in such dispute a professional strikebreaker who customarily and repeatedly offers himself for employment in the place of employees involved in labor disputes.

**(2)** A professional strikebreaker who customarily and repeatedly offers himself for employment in place of employees involved in labor disputes may not take or offer to take the place in employment of an employee involved in a labor dispute within the state.

**39-33-203. Agreements to procure strikebreakers prohibited.** No employer involved in a labor dispute may contract or arrange with any other person, partnership, or firm for the latter to recruit, procure, supply, or refer professional strikebreakers for employment in place of employees involved in the dispute.

**39-33-204. Advertising for strikebreakers restricted.** No person, partnership, or firm may recruit, solicit, or advertise for employees or refer persons to employment in place of employees involved in a labor dispute without adequate notice in such advertisement or reference that there is a labor dispute at the place at which employment is offered and that the employment offered is in the place of employees involved in such dispute.

**39-33-205. Penalties.** A person convicted of violating 39-33-201, 39-33-202, or 39-33-203 shall be punished by a fine of not less than \$1,000 or more than \$5,000 or by imprisonment for not less than 1 or more than 2 years. A person convicted of violating 39-33-204 shall be punished by a fine of not less than \$100 or more than \$500 or imprisonment for not more than 30 days.

## CHAPTER 71

## WORKERS' COMPENSATION

## Part 4 – Coverage, Liability, and Subrogation

**39-71-417. Independent contractor certification. (1) (a) (i)** Except as provided in subsection (1)(a)(ii), a person who regularly and customarily performs services at a location other than the person's own fixed business location shall apply to the department for an independent contractor exemption certificate unless the person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3.

**(ii)** An officer or manager who is exempt under 39-71-401(2)(r)(iii) or (2)(r)(iv) may apply, but is not required to apply, to the department for an independent contractor exemption certificate.

**(b)** A person who meets the requirements of this section and receives an independent contractor exemption certificate is not required to obtain a personal workers' compensation insurance policy.

**(c)** For the purposes of this section, "person" means:

**(i)** a sole proprietor;

**(ii)** a working member of a partnership;

**(iii)** a working member of a limited liability partnership; or

**(iv)** a working member of a member-managed limited liability company.

**(2)** The department shall adopt rules relating to an original application for or renewal of an independent contractor exemption certificate. The department shall adopt by rule the amount of the fee for an application or certificate renewal. The application or renewal must be accompanied by the fee.

**(3)** The department shall deposit the application or renewal fee in an account in the state special revenue fund to pay the costs of administering the program.

**(4) (a)** To obtain an independent contractor exemption certificate, the applicant shall swear to and acknowledge the following:

**(i)** that the applicant has been and will continue to be free from control or direction over the performance of the person's own services, both under contract and in fact; and

**(ii)** that the applicant is engaged in an independently established trade, occupation, profession, or business and will provide sufficient documentation of that fact to the department.

**(b)** For the purposes of subsection (4)(a)(i), an endorsement required for licensure, as provided in 37-47-303, does not imply or constitute control.

**(5)** An applicant for an independent contractor exemption certificate shall submit an application under oath on a form prescribed by the department and containing the following:

**(a)** the applicant's name and address;

**(b)** the applicant's social security number;

(c) each occupation for which the applicant is seeking independent contractor certification; and

(d) other documentation as provided by department rule to assist in determining if the applicant has an independently established business.

(6) The department shall issue an independent contractor exemption certificate to an applicant if the department determines that an applicant meets the requirements of this section.

(7) (a) When the department approves an application for an independent contractor exemption certificate and the person is working under the independent contractor exemption certificate, the person's status is conclusively presumed to be that of an independent contractor.

(b) A person working under an approved independent contractor exemption certificate has waived all rights and benefits under the Workers' Compensation Act and is precluded from obtaining benefits unless the person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3.

(c) For the purposes of the Workers' Compensation Act, a person is working under an independent contractor exemption certificate if:

(i) the person is performing work in the trade, business, occupation, or profession listed on the person's independent contractor exemption certificate; and

(ii) the hiring agent and the person holding the independent contractor exemption certificate do not have a written or an oral agreement that the independent contractor exemption certificate holder's status with respect to that hiring agent is that of an employee.

(8) Once issued, an independent contractor exemption certificate remains in effect for 2 years unless:

(a) suspended or revoked pursuant to 39-71-418; or

(b) canceled by the independent contractor.

(9) If the department's independent contractor central unit denies an application for an independent contractor exemption certificate, the applicant may contest that decision as provided in 39-71-415(2).

**39-71-418. Suspension or revocation of independent contractor exemption certificate.** (1) The department may suspend an independent contractor exemption certificate for a specific business relationship if the department determines that the employing unit exerts or retains a right of control to a degree that causes a certificate holder to violate the provisions of 39-71-417(4).

(2) The department may revoke an independent contractor exemption certificate after determining that the certificate holder:

(a) provided misrepresentations in the application affidavit or certificate renewal form;

(b) altered or amended the application form, the renewal application form, other supporting documentation required by the department, or the independent contractor exemption certificate; or

(c) failed to cooperate with the department in providing information relevant

to the continued validity of the holder's certificate.

(3) A decision by the department to suspend or revoke an independent contractor exemption certificate takes effect upon issuance of the decision. Suspension or revocation of the independent contractor exemption certificate does not invalidate the certificate holder's waiver of the rights and benefits of the Workers' Compensation Act for the period prior to notice to the hiring agent by the department of the department's decision to suspend or revoke the independent contractor exemption certificate.

(4) A decision by the department's independent contractor central unit to suspend or revoke an independent contractor exemption certificate may be contested in the same manner as provided in 39-71-415(2).

**39-71-419. Independent contractor violations -- penalty. (1) A** person may not:

(a) perform work as an independent contractor without first:

(i) obtaining from the department an independent contractor exemption certificate unless the individual is not required to obtain an independent contractor exemption certificate pursuant to 39-71-417(1)(a); or

(ii) electing to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3;

(b) perform work as an independent contractor when the department has revoked or denied the independent contractor's exemption certificate;

(c) transfer to another person or allow another person to use an independent contractor exemption certificate that was not issued to that person;

(d) alter or falsify an independent contractor exemption certificate; or

(e) misrepresent the person's status as an independent contractor.

(2) An employer may not:

(a) require an employee through coercion, misrepresentation, or fraudulent means to adopt independent contractor status to avoid the employer's obligations to provide workers' compensation coverage; or

(b) exert control to a degree that causes the independent contractor to violate the provisions of 39-71-417(4).

(3) In addition to any other penalty or sanction provided in this chapter, a person or employer who violates a provision of this section is subject to a fine to be assessed by the department of up to \$1,000 for each violation. The department shall deposit the fines in the uninsured employers' fund. The lien provisions of 39-71-506 apply to any assessed fines.

(4) A person or employer who disputes a fine assessed by the department pursuant to this section may file an appeal with the department within 30 days of the date on which the fine was assessed. If, after mediation, the issue is not resolved, the issue must be transferred to the workers' compensation court for resolution.

\* \* \* \* \*

For workers' compensation purposes during this period in question, a worker must meet **all** sections of the law to be an independent contractor.

Persons who need more information or who have questions about the definition of an independent contractor can contact the Independent Contractor Central Unit at 444-7734 or write to P.O. Box 8011, Helena, MT 59604-8011.

## TITLE 41

### MINORS

#### CHAPTER 2

#### CHILD LABOR

##### Part 1 – Child Labor Standards Act

**41-2-102. Short title.** This part may be cited as the “Child Labor Standards Act”.

**41-2-103. Definitions.** As used in this part, the following definitions apply:

(1) “Agriculture” means:

(a) all aspects of farming, including the cultivation and tillage of the soil;

(b) (i) dairying; and

(ii) the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, including commodities defined as agricultural commodities in the federal Agricultural Marketing Act (12 U.S.C. 1141j(g));

(c) the raising of livestock, bees, fur-bearing animals, or poultry; and

(d) any practices, including forestry or lumbering operations, performed by a farmer or on a farm as an incident to or in conjunction with farming operations, including preparation for market or delivery to storage, to market, or to carriers for transportation to market.

(2) “Department” means the department of labor and industry provided for in 2-15-1701.

(3) “Domestic service” means an occasional, irregular, or incidental nonhazardous occupational activity related to and conducted in or around a private residence, including but not limited to babysitting, pet sitting or similar household chore, and manual yard work. Domestic service specifically excludes industrial homework.

(4) (a) “Employed” or “employment” means an occupation engaged in, permitted, or suffered, with or without compensation in money or other valuable consideration, whether paid to the minor or to some other person, including but not limited to occupations as servant, agent, subagent, or independent contractor.

(b) The term does not include casual, community service, nonrevenue raising, uncompensated activities.

(5) “Employer” includes an individual, partnership, association, corporation, business trust, person, or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.

(6) “Minor” means an individual under 18 years of age, except for an individual who:

(a) has received a high school diploma or has received a passing score on



the general education development examination; or

(b) is 16 years of age or older and is enrolled in a registered state or federal apprenticeship program.

(7) "Occupation" means:

(a) an occupation, service, trade, business, or industry in which employees are employed;

(b) any branch or group of industries in which employees are employed; or

(c) any employment or class of employment in which employees are employed.

**41-2-104. Exemptions.** The provisions of this part do not apply to a minor who is employed:

(1) in an agricultural occupation not otherwise prohibited by this part and who has received written consent from the minor's parents or a person standing in place of the parent who works on a farm or ranch where the parent or person is also employed;

(2) in domestic service or an agricultural pursuit performed outside school hours in connection with a home or a farm owned or operated by the minor's parent or by a person standing in place of the parent;

(3) by the parent or a person standing in place of the parent;

(4) during periods of school vacations on a campsite of a nonprofit corporation engaged in citizenship training and character building;

(5) as an actor, model, or performer;

(6) outside school hours by a home owner in casual work usual to the home of the home owner and not in connection with the home owner's business, trade, or profession;

(7) by the legislature as a legislative aide or page;

(8) in the distribution or sale of or in the collection for newspapers, periodicals, or circulars; or

(9) as an official or referee for a nonprofit athletic organization. A minor who is under the age of 14 may not officiate at adult events or activities.

**41-2-105. Prohibited employment of minors under fourteen years of age.** Except as provided in 41-2-104, a minor who is under 14 years of age may not be employed in or in connection with an occupation.

**41-2-106. Prohibited employment of minors who are fourteen and fifteen years old.** Unless otherwise exempted, a minor 14 or 15 years of age may not be employed in the prohibited occupations in 41-2-107 or in:

(1) a manufacturing occupation;

(2) a processing occupation, including but not limited to filleting fish, dressing poultry, cracking nuts, or laundering and drycleaning;

(3) an occupation that requires the performance of duties in a workroom or workplace where goods are manufactured, mined, or processed;

(4) the operation or tending of a hoisting apparatus or of power-driven

machinery;

(5) an occupation in connection with:

(a) transporting persons or property by rail, highway, air, water, pipeline, or other means;

(b) warehousing and storage;

(c) communication and public utilities; or

(d) construction or repair;

(6) an occupation in a retail, food service, or gasoline establishment, including:

(a) work performed in or around a boiler or an engine room;

(b) work in connection with the maintenance or the repair of an establishment, machine, or equipment;

(c) outside window washing that involves working from windowsills and all work requiring the use of ladders, scaffolds, or their substitutes at a height of more than 20 feet;

(d) an occupation that involves operating, assembling, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers and cutters, or bakery-type mixers;

(e) work in freezers and meat coolers and all work preparing meat for sale, except wrapping, scaling, labeling, weighing, pricing, and stacking when performed in other areas;

(f) loading or unloading goods to and from a truck, railroad car, or conveyor; or

(g) an occupation in a warehouse, except for office or clerical work;

(7) the following agricultural occupations, unless otherwise exempt or working as a student-learner pursuant to 41-2-109:

(a) felling, bucking, skidding, loading, or unloading timber with a butt diameter of more than 9 inches;

(b) repairing a building from a ladder or scaffold at a height of more than 20 feet;

(c) working inside:

(i) a fruit, forage, or grain storage structure designed to retain an oxygen-deficient or toxic atmosphere; or

(ii) an upright silo within 2 weeks after silage has been added or when a top unloading device is in operating position;

(d) handling or using agricultural chemicals classified as poisonous;

(e) handling or using a blasting agent, including but not limited to dynamite, black powder, sensitized ammonium nitrate, blasting caps, or primer cord; or

(f) transporting, transferring, or applying anhydrous ammonia.

**41-2-107. Prohibited employment of minors who are sixteen and seventeen years old.** Unless working as an apprentice or student-learner under the provisions of 41-2-110, a minor 16 or 17 years of age may not be employed in or in connection with any of the following occupations:

(1) manufacturing or storing explosives or articles containing explosive

components;

- (2) logging and the operation of a sawmill, lath mill, or shingle mill;
- (3) the operation of power-driven woodworking machines;
- (4) an occupation involving exposure to a radioactive substance or ionizing radiation;
- (5) the operation of a freight elevator, except for a freight elevator permitted for use under the child labor provisions of the federal Fair Labor Standards Act of 1938, or other power-driven hoisting apparatus;
- (6) the operation of a power-driven metal forming, punching, and shearing machine;
- (7) a mining occupation;
- (8) slaughtering, meatpacking, meat processing, or rendering;
- (9) the operation of a power-driven bakery machine;
- (10) the operation of a power-driven paper products machine;
- (11) the manufacture of brick, tile, or similar products;
- (12) the operation of a circular saw, bandsaw, or guillotine shears;
- (13) a wrecking or demolition operation;
- (14) an excavation operation;
- (15) a roofing operation;
- (16) riding outside a motor vehicle to assist in transporting or delivering goods; and
- (17) a coal mining operation.

**41-2-108. Employment of minors who are fourteen and fifteen years old.** (1) Unless enrolled in and employed pursuant to a school-supervised and school-administered work experience or career exploration program pursuant to 41-2-115(2), a minor 14 or 15 years of age may not be employed in any occupation during school hours.

- (2) A minor 14 or 15 years of age may be employed outside school hours in:
  - (a) the distribution or sale of or in the collection for newspapers, magazines, periodicals, or circulars; and
  - (b) the following occupations in retail, food service, and gasoline service establishments:
    - (i) office and clerical work, including the operation of an office machine;
    - (ii) cashiering, selling, modeling, art work, work in an advertising department, window trimming, and comparative shopping;
    - (iii) price marking and tagging by hand or by machine, assembling orders, packing, and shelving;
    - (iv) bagging and carrying out a customer's order;
    - (v) errand and delivery work by foot, bicycle, or public transportation;
    - (vi) cleanup work, including the use of a vacuum cleaner and a floor waxer, and maintenance of grounds, but not including the use of a power-driven mower or cutter;
    - (vii) kitchen work and other work involved in preparing and serving food and beverages, including the operation of machines and devices used in the

performance of the work, which may include but are not limited to a dishwasher, toaster, dumbwaiter, popcorn popper, milkshake blender, and coffee grinder; or

(viii) work in connection with cars and trucks if confined to dispensing gasoline and oil; courtesy service; car cleaning, washing, and polishing; but not including work involving the use of a pit, a rack, or a lifting apparatus or involving the inflation of a tire mounted on a rim equipped with a removable ring.

#### **41-2-109. Exemptions from prohibited occupations in agriculture.**

(1) The prohibitions from employment in agricultural operations provided for in 41-2-106(7) do not apply to the employment of a student-learner who is 14 or 15 years of age if all of the following requirements are met:

(a) The student-learner is enrolled in a K-12 career and vocational/technical education training program in agriculture under a recognized state or local educational authority or in a substantially similar program conducted by a private school.

(b) The student-learner is employed under a written agreement, providing that:

(i) the work is incidental to training;

(ii) the work is intermittent, for short periods of time, and under the direct and close supervision of a qualified and experienced person;

(iii) safety instruction is given by the school and correlated by the employer with on-the-job training; and

(iv) a schedule of organized and progressive work processes to be performed on the job has been prepared.

(c) The written agreement contains the name of the student-learner and is signed by the employer and by a person authorized to represent the educational authority or school.

(d) Copies of each agreement are kept on file both by the educational authority or school and by the employer.

(2) The prohibitions in 41-2-106(7) do not apply to the employment of a minor who is 14 or 15 years of age in those occupations in which the minor has successfully completed a work training program, including safety instruction and training in the use of machinery, under the 4-H program of the federal extension service, a program of the United States department of education, or a similar program if the safety program has been approved by the department and if the minor is employed outside school hours on the equipment for which the minor has been trained.

**41-2-110. Exemptions from prohibited employment of minors who are sixteen or seventeen years old.** (1) The prohibitions in 41-2-107 do not apply to the employment of an apprentice or student-learner who is 16 or 17 years of age if the minor is employed under the following conditions:

(a) for an apprentice, if:

(i) the minor is employed in a craft recognized as an apprenticeable trade;

(ii) the work is incidental to the minor's training;

(iii) the work is intermittent, for short periods of time, and under the direct and close supervision of a journeyman as a necessary part of the apprentice training; and

(iv) the minor is registered by the bureau of apprenticeship and training of the United States department of labor as employed in accordance with the standards established by that bureau or is registered by the department as employed in accordance with the standards of the department;

(b) for a student-learner, if:

(i) the student-learner is enrolled in a course of study and training in a cooperative vocational training program under a recognized state or local educational authority or in a course of study in a substantially similar program conducted by a private school;

(ii) the student-learner is employed under a written agreement, providing that:

(A) the work of the student-learner is incidental to the student-learner's training;

(B) the work is intermittent, for short periods of time, and under the direct and close supervision of a qualified and experienced person;

(C) safety instruction is given by the school and correlated by the employer with on-the-job training; and

(D) a schedule of organized and progressive work processes to be performed on the job has been prepared;

(iii) the written agreement contains the name of the student-learner and is signed by the employer and the school coordinator or principal; and

(iv) copies of each agreement are kept on file both by the educational authority or school and by the employer.

(2) This exemption for the employment of student-learners may be revoked by the department in any situation if the department finds that reasonable precautions have not been observed for the safety of minors employed under the exemption.

(3) A high school graduate who is 16 or 17 years of age may be employed in an occupation in which the graduate has completed training as a student-learner as provided in this section.

**41-2-115. Working hours.** (1) Unless otherwise exempt or as provided in subsection (2), a minor who is 14 or 15 years of age:

(a) may not be employed before 7 a.m. or after 7 p.m., except that the minor may be employed until 9 p.m. during periods outside the school year (June 1 through Labor Day, depending on local standards); or

(b) may not be employed more than:

(i) 3 hours on a school day;

(ii) 18 hours in a school week;

(iii) 8 hours on a nonschool day; or

(iv) 40 hours in a week in a nonschool week.

(2) A minor who is 14 or 15 years of age and who is enrolled in and

employed pursuant to a school-supervised and school-administered work experience or career exploration program approved by the department or the office of public instruction may be employed up to 23 hours in 1 week when the program is in session, any portion of which may be during school hours.

**41-2-116. Enforcement -- right to enter and inspect premises and records -- subpoena power.** The department shall enforce the provisions of this part and file a complaint against a person who violates the provisions of this part. The department may at any time enter and inspect any place or establishment governed by the provisions of this part and have access to employment records kept on file by the employer that may aid in the enforcement of this part. The department may subpoena documentary evidence relating to an investigation under this part.

**41-2-117. Power to adopt rules.** The department may adopt rules, including definitions of terms, to carry out the purposes of this part and to prevent the circumvention or evasion of this part.

**41-2-118. Penalties.** An employer who violates any of the provisions of this part is guilty of a misdemeanor and is punishable as provided in 46-18-212. Each day during which a violation of this part continues constitutes a separate offense, and the employment of a minor in violation of this part constitutes, with respect to each minor employed, a separate offense.

**41-2-119 and 41-2-120 reserved.**

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